80-1595

No.

Office-Supreme Court, U.S.
FILED
MAR 20 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH C. FRADY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the "plain error" standard of Fed. R. Crim. P. 52(b) governs the availability of collateral relief from a criminal conviction that is challenged on the basis of erroneous jury instructions to which no objection was made at trial or on direct appeal.

2. Whether, assuming "cause" must be shown to excuse a defendant collaterally attacking his conviction from the consequences of his failure to make timely objection, that standard is satisfied by the conclusion that objection may have been futile.

3. Whether respondent established sufficient cause for his failure to object to erroneous jury instructions and prejudice as a result of those instructions to warrant setting aside his conviction on collateral attack pursuant to 28 U.S.C. 2255.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-18a) is reported at 636 F.2d 506. The order of the district court (App. D, *infra*, 29a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 19a-20a) was entered on August 4, 1980. A

petition for rehearing with a suggestion for rehearing en banc was denied on October 22, 1980 (App. C, *infra*, 21a-28a). On January 13, 1981, the Chief Justice extended the time in which to petition for a writ of certiorari to and including February 19, 1981. On February 11, 1981, Justice Brennan further extended the time in which to petition for a writ of certiorari to and including March 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

Rule 30 of the Federal Rules of Criminal Procedure provides in relevant part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection * * *.

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

1. a. On March 13, 1963, respondent and Richard A. Gordon brutally murdered Thomas Bennett. The victim's "head had been caved in by several blows from a blunt instrument and a mixture of blood and brains was coming from the wounds. * * * One of the victim's eyes had been knocked from its socket and was lying on his cheek when the officers arrived" (*Frady* v. *United States* (*Frady I*), 348 F.2d 84, 100 (D.C. Cir.) (en banc), cert. denied, 382 U.S. 909 (1965)). Respondent and Gordon battered and stomped their victim to death. One of the lethal implements appears to have been a broken piece of a table top. There were horseshoe-shaped marks on the victim's neck and chest that corresponded in size and shape with the metal heel plates on respondent's leather boots; dried blood was found around the heel of respondent's left boot.

Hearing the victim's screams for help during the struggle, which lasted for at least ten minutes, a neighbor called the police. Respondent and his co-defendant were captured as they left the scene of the killing covered with blood. Subsequent investigation revealed that respondent had driven past the victim's house twice earlier on the day of the murder. From this evidence and other testimony at trial "the jury could have concluded that Frady and Gordon twice reconnoitered so they would know Bennett's

house when they returned later in the evening after darkness had completely fallen" (*Frady I*, *supra*, 348 F.2d at 102). Immediately before the murder, respondent and Gordon met with the victim's brother. During the course of their conversation respondent asked the victim's brother about the possibility of killing a man by hitting him in the chest, "could you break a rib and fracture or puncture a lung * * *" (*id.* at 103). As respondent and Gordon prepared to leave, the victim's brother promised them a "bonus" if they did a "good job" (*ibid.*). "[T]he jury could well have concluded that Frady and Gordon were assassins hired by George Bennett to do away with his brother * * *" (*ibid.*).

At trial, the defense was a complete denial of responsibility. Respondent and his co-defendant attacked the credibility of the prosecution witnesses and suggested that another man, the real murderer, had been seen leaving the house of the victim. The question of intent was not in issue; there was no hint of self-defense or any other defense affecting the degree of culpability.

The elements of first-degree murder in the District of Columbia, as pertinent here, require that the killing be done "* * * purposely * * * of deliberate and premeditated malice * * *" (D.C. Code Ann. § 22-2401 (1973)). A finding of malice alone, without deliberation and premeditation, can only support a conviction of second-degree murder (D.C. Code Ann. § 22-2403 (1973)). Absent malice, a culpable homicide is classified as manslaughter. During the course of a lengthy charge to the jury, the trial court said (Tr. 806; emphasis added):

> The instrument or means by which a homicide has been accomplished is always to be taken into consideration in determining whether the act is

> criminal and in what degree it may be so. If in a prosecution for homicide it is shown that the accused used a deadly weapon in the commission of the homicide, *the law infers or presumes from the use of such weapon in the absence of explanatory or mitigating circumstances the existence of the malice essential to culpable homicide.*

The court also stated (*ibid;* emphasis added):

> In determining *whether a wrongful act is intentionally done and is therefore done with malice aforethought,* you should again bear in mind that every man is presumed to intend the natural and probable consequences of his own act. As I have already told you, the intent may be deduced from all the circumstances.[1]

No objection was made to either of these instructions by the defense. The jury found both defendants guilty of first-degree premeditated and deliberate murder and of robbery, but, in accordance with the trial court's instructions regarding the proper verdict in the event of a conviction of premeditated murder, it found the defendants not guilty of felony-murder.

b. On direct appeal, the court of appeals affirmed respondent's conviction of first degree murder, specifically rejecting his claim that the evidence of premeditation and deliberation had been insufficient. *Frady I, supra,* 348 F.2d at 85-86, 99-103 (Miller,

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[1] The italicized portions of the instructions were the basis for the decision of the court of appeals in this case. The court of appeals expressly declined to decide whether this Court's decision in *Sandstrom* v. *Montana,* 442 U.S. 510 (1979), was applicable in this case (App. A, *infra,* 5a-6a n.7).

J.).[2] Just two years after its decision in *Frady I*, the court of appeals observed that it was error to state that " 'the law infers * * * malice' " from the use of a deadly weapon and that a correct statement would be that the law permits the jury to infer malice. *Belton* v. *United States*, 382 F.2d 150, 154 (1967); see *Howard* v. *United States*, 389 F.2d 287, 291 (D.C. Cir. 1967).[3] In *Belton*, the court declined to find "plain error" and affirmed the conviction for first degree murder, saying: "A jury inferring premeditation and deliberation could hardly have failed to infer malice" (382 F.2d at 155).[4] The following year, the court of appeals noted that "[a] wrongful

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[2] The court also affirmed respondent's robbery conviction. For reasons that are immaterial in this case, the court vacated the sentence of death that had been imposed on the murder conviction and remanded the case, directing the trial court to resentence respondent to life imprisonment, "the only sentence other than death that [could] be imposed" under the statute as it existed then. *Frady I*, *supra*, 348 F.2d at 85. In accordance with the instructions of the court of appeals, the trial court resentenced respondent to life imprisonment on the murder conviction. The district court also expressly stated that the sentence on the robbery conviction, which would have become academic had the death sentence been carried out, was to be consecutive to the sentence of life imprisonment.

[3] In *Belton* the court attributed the trial court's misstatement to inadvertence, stating:

> We have little doubt that if objection had been made this slip of the tongue by a capable trial judge—assuming the reporter heard him right—would have been corrected.

382 F.2d at 154.

[4] In *Howard* the court also declined to find "plain error" requiring reversal. 389 F.2d at 291.

act intentionally done is not therefore done with malice" (*Green* v. *United States* (*Green I*), 405 F.2d 1368, 1370 (D.C. Cir. 1968) and, accordingly, held that it was error to equate the two concepts by using the phrase " 'whether a wrongful act is intentionally done and, therefore, is done with malice' " in jury instructions (*ibid.*). See *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970); *Sims* v. *United States*, 405 F.2d 1381, 1384 n.5 (D.C. Cir. 1968). As in *Belton*, the court attributed the district court judge's misstatement to "inadverten[ce]" (*Green I*, *supra*, 405 F.2d at 1370) rather than to any lack of clarity in the law.[5]

c. After filing at least six meritless motions to have his sentence reduced, modified, or vacated (including one alleging ineffective assistance of counsel), respondent moved to vacate his sentence on the robbery conviction because the murder and robbery arose out of the same transaction (App. A, *infra*, 2a-3a n.2). The motion was denied; the court of appeals denied leave to appeal in forma pauperis, concluding that there was no merit in the claim. *United States* v. *Frady* (*Frady II*), 607 F.2d 383, 385 (D.C. Cir. 1979). Respondent modified his claim in a motion for reconsideration, arguing that the consecutive sentence on the robbery conviction violated the Double Jeopardy Clause. Since the robbery sentence was originally "concurrent with the sentence of death for the murder" (*id.* at 386), respondent had already begun to serve the sentence when the court of appeals vacated the death sentence and remanded for resentencing (*id.* at 386-387).

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[5] Neither *Belton*, *Howard*, *Green*, nor *Wharton* purports to rest on constitutional grounds or to overrule any prior decision.

Therefore, the court of appeals concluded, "alteration" of the robbery sentence by making it consecutive to the sentence for murder violated the Fifth Amendment. The court of appeals directed the district court to enter an order making the robbery sentence concurrent with the life sentence on the murder conviction. 607 F.2d at 387.

2. Less than three weeks after the decision in *Frady II* was announced, respondent collaterally attacked his murder conviction pursuant to 28 U.S.C. 2255. For the first time (see App. A, *infra*, 3a n.3), respondent claimed that the erroneous jury instructions given in his case warranted vacation of his murder conviction. The district court denied the motion on the ground that respondent either had or "could have" raised these claims on direct appeal from his 1963 conviction or in one of his previous motions for relief under 28 U.S.C. 2255 (App. D, *infra*, 29a). The court of appeals reversed (App. A, *infra*, 1a-18a).

Relying on *Davis* v. *United States*, 411 U.S. 233 (1973), the court of appeals reasoned that "plain error" (Fed. R. Crim. P. 52(b)) in jury instructions could be noticed on direct appeal notwithstanding a failure to object at trial as required by Fed. R. Crim. P. 30, and therefore "plain error" could also be noticed on collateral attack (App. A, *infra*, 6a-8a).[6] Respondent's failure to object at trial consequently did not bar consideration of the claim on collateral attack. The instructions were clearly wrong in light of *Belton*, *Howard*, *Green*, and *Whar-*

[6] Since the instructional errors in this case stated "colorable" constitutional claims, they were deemed to be cognizable in a Section 2255 proceeding without regard to their probable significance at trial. Compare *Davis* v. *United States*, 417 U.S. 333, 345-346 (1974).

ton (App. A, *infra*, 5a) and, in the court's view, "the evidence of malice was equivocal" (*id.* at 11a). Since the erroneous instructions "may well have precluded the reasonable juror from considering manslaughter as a possible verdict" (*ibid.*), the court found that the plain error standard had been satisfied.

The court also held that if the "cause" and "actual prejudice" standard of *Davis*, *supra*, were applicable, it too was satisfied (App. A, *infra*, 14a-15a n.17). Since the erroneous instructions "were standard" (*ibid.*) at the time of respondent's trial, respondent's "counsel had every right to assume that any objection to the instructions would have been futile" (*id.* at 13a). In the court's view, the perceived futility of objection was sufficient "cause" under *Davis* to excuse the failure to object. The showing of "actual prejudice" required by *Davis* was established, according to the court of appeals, because the evidence of malice was "equivocal" and the instructions may have precluded the jury from returning a manslaughter verdict.[7]

The court denied the government's petition for rehearing en banc, four judges dissenting (App. C, *infra*, 21a-28a). In the dissenters' view, the panel (*id.* at 28),

> [u]sing the standard of direct appeal instead of collateral review; ignoring the *en banc* decision * * * on direct appeal; mischaracterizing

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[7] The court of appeals simply ignored the district court's conclusion (App. D, *infra*, 29a) that respondent was not entitled to relief because he could have raised his present contentions in his prior motions for relief under 28 U.S.C. 2255. See *Sanders* v. *United States*, 373 U.S. 1, 17-18 (1963).

> evidence this court had found to be clear, convincing and sufficient; * * * misinterpreting and misapplying recent Supreme Court cases * * * has managed to free at last a brutal contract killer originally thought worthy of the death penalty.

REASONS FOR GRANTING THE PETITION

In sustaining respondent's claim for relief in this case, the court of appeals has not only released "a brutal contract killer" (App. C, *infra*, 28a), but also ignored the decisions of this Court and radically expanded the scope of review available on collateral attack. While this case involves jury instructions concerning malice in a murder prosecution, the reasoning of the court of appeals would be no less applicable in any case involving a significant error in jury instructions or an erroneous evidentiary ruling. If, as the court of appeals held, the failure to object to erroneous jury instructions or to raise the point on appeal may be overlooked solely on the ground that objection might have been "assumed" to be futile, or if the erroneous instruction may simply be reviewed under the plain error standard of Fed. R. Crim. P. 52(b), every change or clarification in the law concerning such matters will prompt a new round of collateral attacks.[8] "Appeals" under 28 U.S.C. 2255 will be "interminable" (*Sunal* v. *Large*, 332 U.S. 174, 182 (1947)).

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[8] The analysis employed by the court of appeals in this case seems to require that any such decision be given completely retroactive effect (see App. A, *infra*, 15a-17a).

Furthermore, if the ephemeral showing of "prejudice" made in this case is sufficient to satisfy the "actual prejudice" standard of *Davis* v. *United States*, 411 U.S. 233 (1973), or the requirements of Rule 52(b), collateral attack is little different from review on direct appeal where the claim has been preserved, and no showing of significant prejudice is required.

Finally, if the court of appeals is correct that the defective instruction on malice given at respondent's trial was a standard one,[9] the practical effect of its decision in the instant case is that virtually all murder convictions obtained in the District of Columbia prior to the decision in *Belton* v. *United States*, 382 F.2d 150 (D.C. Cir. 1967), in cases involving the use of a weapon, are subject to successful collateral attack.

1. The court of appeals concluded in this case that the discretion afforded courts pursuant to Fed. R. Crim. P. 52(b) to notice and correct "[p]lain errors or defects affecting substantial rights * * *" provides the appropriate "standard of review" in considering collateral attacks upon final convictions pursuant to Section 2255 (App. A, *infra*, 8a). This holding is inconsistent with the "cause and prejudice" standard evolved by this Court (see *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Davis* v. *United States*, *supra*) for determining the circumstances in which a defendant collaterally attacking his conviction will be excused from the consequences of a procedural de-

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[9] We note that there is reason to doubt the accuracy of the assertion that this was a "standard" instruction at the time of respondent's trial. See note 14, *infra*.

fault. It has the effect of obliterating the distinction between direct and collateral review of criminal convictions, thereby dramatically increasing the susceptibility of otherwise final judgments in criminal cases to collateral attack. The striking ramifications of this holding for the administration of criminal justice call for review by this Court.

The issue in the present case is whether respondent should be permitted to attack his conviction on the basis of concededly erroneous jury instructions that he neither objected to at trial nor challenged on appeal. Under the "cause and prejudice" standard employed by this Court in cases of procedural default, no relief can be granted in a collateral attack proceeding unless the movant demonstrates that there was some substantial reason justifying his failure to raise the particular claim in a timely fashion. The inquiry is appropriately focused upon the "cause" alleged to excuse the failure to comply with the procedural rule—here Fed. R. Crim. P. 30, which requires contemporaneous objection to portions of jury instructions deemed erroneous—and its sufficiency in light of the purposes the procedural rule was designed to serve.[10]

The "plain error" standard of Rule 52(b), on the other hand, is ill-suited to the context of collateral attack and was, we submit, never designed or in-

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[10] The movant's burden to demonstrate "cause" for excusing the failure to make timely objection during the course of a trial is particularly great because timely objection might prevent the error altogether. See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 88-89; *Henderson* v. *Kibbe*, 431 U.S. 145, 157-158 (1977) (Burger, C.J., concurring); *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring).

tended for use in that context. Rather, it was designed to allow courts, in the context of trial and direct appeal, to recognize and correct obvious errors notwithstanding counsel's failure to make appropriate objection or seek appellate review of the claim. It confers broad discretion to correct errors overlooked by counsel essentially without regard to the existence of any excuse or justification for counsel's dereliction.[11] The court of appeals' adoption of "plain error" as the standard of review thus effectively nullifies the "cause" portion of the "cause and prejudice" standard evolved by this Court.[12]

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[11] Even on direct appeal, we believe there are limits on the power of the court to excuse a procedural default under the "plain error" provision of Rule 52(b). For example, we believe the power would not reach waivers resulting from failure of timely compliance with Rule 12, since that rule contains its own directive regulating relief from such waivers, and specifically requires a showing of "cause." Fed. R. Crim. P. 12(f).

It is also arguable that Rule 30, which provides unequivocally that "[n]o party may assign as error any portion of the charge * * * unless he objects thereto before the jury retires to consider its verdict * * *," bars application of plain error principles to improper jury instructions. Most courts, however, have concluded that "plain error" in jury instructions may be noticed on direct appeal. See, *e.g.*, *United States* v. *Spiegel*, 604 F.2d 961 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980); *Government of the Virgin Islands* v. *Navarro*, 513 F.2d 11 (3d Cir.), cert. denied, 422 U.S. 1045 (1975); see also *Namet* v. *United States*, 373 U.S. 179, 190-191 (1963). We accept for present purposes the soundness of those decisions, but we believe it is entirely unwarranted to extend them to the context of collateral attacks.

[12] There is something especially incongruous about applying the doctrine of plain error in a collateral attack by a federal prisoner such as respondent, who has already had his

In the process of obliterating any meaningful distinction between direct appeal and collateral attack, the court of appeals nowhere acknowledged the repeated admonitions of this Court that there are fundamental differences between these two remedies. As the Court recently emphasized in *United States* v. *Addonizio*, 442 U.S. 178, 184 (1979):

> When Congress enacted § 2255 in 1948, it simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and collateral review. It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.

The Court went on to explain (*id.* at 184-185 n.11):

> Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. * * * Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful. See *Stone* v.

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conviction painstakingly reviewed by an en banc court of appeals, to which the error in question either was not "plain" or was not deemed sufficiently substantial to warrant discussion in its thorough opinions, let alone reversal of the conviction.

Powell, 428 U.S. 465, 491 n.31; *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13.

See also *Sumner* v. *Mata*, No. 79-1601 (Jan. 21, 1981), slip op. 11 n.3.

The distinction has been specifically noted by this Court in the context of collateral attacks based upon erroneous jury instructions. "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). While this statement was made in the context of review of a state judgment, with its attendant constitutional constraints, the views it reflects seem to us fully appropriate in the federal context, where, indeed, the defendant will already have enjoyed review as a matter of right in a federal appellate court.

In sum, this Court's decisions in *Davis*, *Wainwright*, and *Francis* require the conclusion that Rule 52(b) is inapposite in this context.[13] By applying the "plain error" standard of Rule 52(b), the court of appeals has either ignored or rendered meaningless the standard for review in Section 2255 proceedings established in *Davis*. "So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal* v. *Large*, *supra*,

[13] Indeed, the majority in *Davis* implicitly rejected Justice Marshall's suggestion (411 U.S. at 252) that the "cause and prejudice" standard was inappropriate on collateral attack because similar procedural defaults could be noticed under Rule 52(b) on direct appeal without such a showing.

332 U.S. at 178; accord, *Stone* v. *Powell*, 428 U.S. 465, 477 n.10 (1976). The "cause" and "actual prejudice" standard is responsive to the concerns underlying this general rule; Fed. R. Crim. P. 52(b) is not.

2. The court of appeals attempted to bolster its untenable conclusion that respondent's failure to object to the instructions at trial does not bar relief under Section 2255, by finding alternatively that the "cause and prejudice" standard was satisfied here. According to the court of appeals, at the time of respondent's trial the two erroneous instructions were "standard" (App. A, *infra*, 13a) and, therefore, respondent's "counsel had every right to assume that any objection to the instructions would have been futile" (*ibid.*).[14]

The court of appeals' holding that the assumed futility of objection is sufficient "cause" to justify overlooking the procedural default conflicts with decisions in both the Fourth Circuit and the Second Circuit. *Cole* v. *Stevenson*, 620 F.2d 1055, 1063 (4th Cir. 1980) (en banc) (Section 2254 proceeding); *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980) (Section 2255 proceeding; judgment that suppression motion would have been unsuccessful is insufficient "cause"

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[14] Although the instructions may have been "standard" in 1963, our research has revealed no case in which they were approved, and the court of appeals cited none. Furthermore, in both *Belton* and *Green I* (the two cases in which the instructions were first disapproved), the courts seemed to regard the law on the point as clear. In both cases, the courts attributed the erroneous instructions to inadvertence on the part of the trial court. See 382 F.2d at 154; 405 F.2d at 1370.

under Fed. R. Crim. P. 12).[15] Cf. *Sunal* v. *Large*, *supra*, 332 U.S. at 181 ("since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile"); see also *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952). The Sixth Circuit and, perhaps, the Fifth Circuit seem to agree with the court below that the assumed "futility" of objection is sufficient "cause" for failure to make timely objection. See *Isaac* v. *Engle*, No. 78-3488 (6th Cir. Dec. 12, 1980), slip op. 6-7 (Brown, J.), 15 (Jones, J.) (en banc), petition for cert. pending, No. 80-1430 (filed Feb. 23, 1981) (Section 2254 proceeding); *Tyler* v. *Phelps*, 622 F.2d 172 (5th Cir. 1980) (Section 2254 proceeding; counsel's ignorance or misunderstanding of the law is sufficient "cause").

This Court has left "open for resolution in future decisions the precise definition of the 'cause' and 'prejudice' standard * * *" (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 87).[16] The conflict in the circuits

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[15] See also *Polizzi* v. *United States*, 550 F.2d 1133, 1138-1139 (9th Cir. 1976) (Section 2255 proceeding; good faith ignorance is insufficient "cause"); *Dumont* v. *Estelle*, 513 F.2d 793, 798 (5th Cir. 1975) (Section 2254 proceeding; "the mere unencouraging status of the law at the time of trial is not *of itself* 'cause' under *Davis*").

[16] Although not in the context of defining "cause," this Court has made it plain that legitimate procedural rules requiring timely objections to jury instructions may be enforced on collateral attack even if the instructions were standard and objections deemed futile:

> If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objec-

as to whether the assumed "futility" of objection is sufficient "cause" under *Davis* to justify relieving the movant of the obligation to make timely objection should be resolved by this Court, thereby adding content to the "cause" standard.

The position taken by the Fourth and Second Circuits is more consistent with the goals served by the "cause" and "prejudice" standard and contemporaneous objection rules generally than that taken by the court of appeals in this case. If the failure to raise objections to jury instructions will be excused on collateral attack because objection was thought futile, the defendant has little incentive to raise the challenge in timely fashion. Rather, he will make those arguments deemed important to his defense and then await helpful developments in the law. Arguments that were thought to be of marginal significance at trial will be transformed into major elements of the defense in later collateral "appeals." Even if he is unsuccessful in persuading a court that the new development has any bearing on his case, there is nevertheless the possibility that another court will be persuaded in another "appeal." Far from being the "main event," the initial trial will be relegated to the position of a "tryout on the road." See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 90.

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tions to jury instructions incorporating those presumptions. . . . The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. *See, e.g., Fed. Rule Crim. Proc. 30.*

Hankerson v. *North Carolina*, 432 U.S. 233, 244 n.8 (1977).

Contemporaneous objection rules are intended to encourage the defendant to make all of the claims deemed important to his defense during the trial proceeding. It is then that they can be best evaluated (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 88-89) and errors corrected, if necessary. It is absolutely senseless to require either state governments or the federal government to litigate every arguable error in every criminal trial that is revealed or suggested by every subsequent clarification or change in the law.

Respondent has not shown any substantial "cause" for his failure to object to the instructions challenged in this case. Even if the erroneous instructions were "standard," he certainly knew that malice was an element of the offense charged. Malice was well defined even in 1963; it was as clear then as it is now that malice is not the equivalent of intent and that it was for the jury to determine whether the killing was done with malice. Indeed, that the court instructed the jury on this element certainly suggests that everyone recognized that the jury was to determine the existence of malice. If the absence of malice had been significant to his defense, it can fairly be assumed that objection would have been made. See also note 3, *supra*. It appears, then, that the only "cause" for failure to object to the instructions shown by respondent in this case is that the absence of malice was not part of his chosen defense strategy.

3. Appraised realistically, it seems plain beyond all serious dispute that respondent suffered no prejudice, "actual" or otherwise, because of the erroneous jury instructions given during his trial. First, it is established that, even on direct appeal, reversal of a conviction is not to be predicated on isolated errors in jury instructions, in the absence of a realistic likeli-

hood, viewing the trial as a whole, that they infected the verdict. *United States* v. *Park*, 421 U.S. 658, 674 (1975). See also *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); *Henderson* v. *Kibbe*, *supra*.[17]

Second, respondent does not challenge the instructions concerning premeditation and deliberation. Because of the viciousness of the crime and the evidence that this was a "contract killing," it is "inconceivable that the jury that found [respondent] guilty of deliberate and premeditated murder would have failed to find malice * * *." *United States* v. *Green*, 424 F.2d 912, 913 (D.C. Cir. 1970), cert. denied, 400 U.S. 997 (1971).[18] Neither the court of appeals nor

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[17] In the context of the instant case, it is highly unlikely that the brief erroneous portions of the lengthy charge to the jury had any impact at all. "To a lawyer, there is an undeniable gulf between 'the law infers' and 'the law permits you to infer'" (*Belton* v. *United States*, *supra*, 382 F.2d at 154). To the ordinary juror, however, that "gulf" is likely to be perceived as a very thin line, particularly when, as in this case, the court also explained that malice was an element of the offense and that the jury had to find that the government had proved every element of the offense beyond a reasonable doubt. See *id.* at 154-155. The second erroneous instruction, equating intent with malice, was not part of the instruction defining malice, but was given in the context of describing intent. Even if it be assumed that the jurors heard and appreciated the significance of the phrase "and is therefore done with malice," it seems unlikely that they would have understood the judge to be directing them to find malice if they found intent.

[18] Although the sentence of death was set aside on direct appeal, the jury's conclusion that respondent deserved to die for his crime is eloquent testimony that it surely would have found malice even if the court had said you "may infer malice" and had not used the unfortunate phrase "and is therefore done with malice." As the dissenters noted, the verdict indicated that the jurors found "malice aplenty" (App. C, *infra*, 28a).

respondent has suggested any plausible basis for concluding that any jury that found a murder to have been premeditated and deliberate could possibly have concluded that it nevertheless was not done with malice.

Third, the evidence of malice was little short of overwhelming. Respondent and his colleague had been hired by the victim's brother and promised a "bonus" if they did a "good job." Respondent and his colleague bludgeoned and stomped their victim for at least 10 minutes, eventually crushing his skull. Compare, *e.g.*, *Howard* v. *United States*, *supra*, 389 F.2d at 290. If there was any justification for this senseless murder other than the "bonus" promised by the man who hired them, respondent failed to make it known.[19]

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[19] According to the court of appeals, the evidence of malice was "equivocal" (App. A, *infra*, 11a, 13a). As the dissenting judges pointed out, however, the "evidence which [the court of appeals] sitting *en banc* found sufficient to support a verdict of first-degree murder simply cannot fairly be described as 'equivocal'" (App. C, *infra*, 27a). Furthermore, the two factors cited by the court in support of its characterization of the evidence (App. A, *infra*, 11a-12a & n.13) are wholly inadequate. The jury acquitted respondent and his colleague of felony-murder in accordance with the trial judge's instructions (Tr. 803, 819; see App. C, *infra*, 28a) that they could not convict for both premeditated murder and felony-murder. Further, as the dissenters observed, "[t]he verdict reflected the jury's belief that Frady entered the house intending not to rob, but to kill * * *" (App. C, *infra*, 28a). The second factor relied on by the court of appeals (viz., that respondent battered the man to death with a "weapon of chance" (App. A, *infra*, 12)) is strained and unpersuasive, at best. That the killers decided to kill their victim by bludgeoning him with whatever was available in the house, knowing that there would surely be something suitable for the task, provides no basis for concluding that the murder was not premeditated, deliberate, willful, wrongful, intentional, and without justification or excuse.

Fourth, respondent's defense at trial was that someone else had committed the murder. There was no claim of self-defense, passion, accident, or anything else suggesting the absence of "malice" or even relevant to his degree of culpability.

The court of appeals has, 16 years after the trial, set aside a murder conviction because of erroneous jury instructions even though (1) no objection was raised to the instructions at trial (Fed. R. Crim. P. 30); (2) the instructions were not challenged on direct appeal (*Sunal* v. *Large*, *supra*); (3) the instructions were not challenged in any of respondent's prior motions for relief under Section 2255 (*Sanders* v. *United States*, *supra*); (4) respondent has shown no "cause" sufficient to excuse the failure to make timely objection (*Davis* v. *United States*, *supra*); and (5) the instructions were wholly immaterial to his defense (*Wainwright* v. *Sykes*, *supra*). Because of the significant implications of this decision for the administration of criminal justice in the federal courts, review by this Court is required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2356

UNITED STATES, APPELLEE

v.

JOSEPH C. FRADY, APPELLANT

Appeal from the United States District Court for the District of Columbia

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(D.C. Criminal No. 402-63)

Argued June 13, 1980

Decided August 4, 1980

Before McGOWAN and EDWARDS, *Circuit Judges*, and FRIEDMAN,* *Chief Judge*, United States Court of Claims.

Opinion for the court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge:* This case is an appeal from the trial court's denial of the appellant's motion under 28 U.S.C. § 2255 (1976) to overturn his

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* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

murder conviction on the ground that the jury instructions on malice and specific intent were defective. Since we find that at least two of the instructions were in error, substantially affecting the fact-finding process and possibly precluding the jury from considering a manslaughter verdict, we reverse and remand for further proceedings. However, because retrial after so many years may be difficult for either the Government or the appellant, if the Government consents, and the trial court considers it to be in the interest of justice after hearing from both parties, the trial judge may enter a judgment of manslaughter. *See United States* v. *Wharton*, 433 F.2d 451, 461 (D.C. Cir. 1970).

I. Background

Appellant, Joseph Frady, and a co-defendant, who is not a party to this appeal, were indicted in 1963 by a federal grand jury for first degree murder, felony murder, and robbery. After a jury trial, they were convicted of first degree murder and robbery; however, both defendants were acquitted of felony murder. The court subsequently affirmed the appellant's conviction.[1] In the years that followed, the appellant filed numerous motions *pro se* to reduce his sentence.[2]

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[1] The court, however, overturned the death sentence and imposed a life sentence in its place. *See Frady* v. *United States*, 348 F.2d 84 (D.C. Cir.) (*en banc*), *cert. denied*, 382 U.S. 909 (1965).

[2] In 1965 the appellant filed four motions to vacate or reduce his sentence. The trial judge denied each of these motions. In 1974 the trial judge denied another motion to modify the sentence. In 1975 the appellant sought to set aside his conviction under 28 U.S.C. § 2255, alleging in-

In September 1979, the appellant filed a motion under 28 U.S.C. § 2255 (1976) alleging that a jury instructions given at the original trial in 1963 were defective and thus denied him a fair trial. The trial judge denied the motion on the grounds that the appellant could have or did raise the issues in his direct appeal or in the various motions filed following his conviction.[3] Since we find that there was plain error in the jury instructions given at appellant's trial, and since we find that the erroneous instructions clearly prejudiced appellant's right to a fair trial, we hereby reverse and remand.

II. The Jury Instructions

The trial judge instructed the jury on each of the elements of first degree murder, second degree murder, and manslaughter. The elements of first degree murder include malice, specific intent, and premeditation; second degree murder is a killing done with malice but without premediation; manslaughter includes all other unlawful killings done without mal-

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effective assistance of counsel. The trial court denied the motion and the appellant did not appeal the judgment. In 1976 the court denied another motion to reduce the sentence. In 1978 the appellant moved to vacate an illegal sentence. This court held that consecutive sentences for robbery and murder, in the context of this case, violated the ban on double jeopardy, and changed the sentences to run concurrently. *United States* v. *Frady*, 607 F.2d 383 (D.C. Cir. 1979).

[3] As a preliminary matter, we note that there is absolutely no evidence in the record to support the finding of the trial judge that Frady raised the issue of erroneous jury instructions in any motions or appeals after his conviction.

ice.[4] Thus, malice is the element that distinguishes both degrees of murder from manslaughter.

The appellant claims that the jury instructions on malice were erroneous in two respects.[5] First, the trial judge equated specific intent with malice.[6] The effect of this instruction, according to the appellant, "was to take the case out of the category of manslaughter and place it in the category of murder." *Green* v. *United States* (*Green I*), 405 F.2d 1368, 1370 (D.C. Cir. 1968). *See United States* v. *Perkins*, 498 F.2d 1054, 1058 (D.C. Cir. 1974) (condemning the same instruction). Second, the trial judge instructed the jury that "*the law infers or presumes from the use of such weapon* in the absence of explanatory or mitigating circumstances *the existence of the malice* essential to culpable homicide" (Tr. at 806) (emphasis added). Appellant argues that this

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[4] In 1963, at the time when appellant was indicted, the D.C. Code defined first degree murder as a killing done "purposely, either of deliberate and premeditated malice or" during the commission of a felony. D.C. Code Ann. § 22-2401 (1973). The jury, however, acquitted Frady of felony murder.

The Code defined second degree murder as a killing, excluding first degree murder, done with "malice aforethought." D.C. Code Ann. § 22-2403 (1973). Manslaughter is "the unlawful killing of a human being *without malice*." *Fryer* v. *United States*, 207 F.2d 134, 138 (D.C. Cir.), *cert. denied*, 346 U.S. 885 (1953) (emphasis in original). *See United States* v. *Wharton*, 433 F.2d 451, 454 (D.C. Cir. 1970) (malice is "the sole element differentiating murder from manslaughter").

[5] The Government does not dispute the contention that the jury instructions were erroneous.

[6] In his instructions to the jury, the trial judge stated:

> In determining whether a wrongful act is intentionally done *and is therefore done with malice aforethought* . . . .

Trial Transcript ("Tr.") at 806. (emphasis added).

instruction, compelling the jury to presume malice, also prevented the jury from considering a verdict of manslaughter.

Beyond question, each of the cited instructions is erroneous. They are identical to the instructions given in *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970), and *Green* v. *United States* (*Green I*), 405 F.2d 1368 (D.C. Cir. 1968), where this court found the use of the instructions to be reversible error.[7]

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[7] Apart from the two plainly erroneous instructions, the parties disagree as to whether a third instruction, dealing with specific intent, was also so erroneous and prejudicial as to require reversal of the appellant's conviction. On this point, the trial judge instructed the jury that

> A person is presumed to intend the natural [and] probable consequences of his act.

(Tr. at 804). The trial judge subsequently repeated this instruction (Tr. at 806). The appellant contends that under the holding in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), this instruction, given twice in this case, violated the Fourteenth Amendment.

In *Sandstrom*, the Supreme Court held unanimously that a similar instruction—"[t]he law presumes that a person intends the ordinary consequences of his voluntary acts"—may lead the reasonable juror to conclude that the presumption is conclusive. Even if it were rebuttable, the presumption would impermissibly shift the burden of proof to the defendant. 442 U.S. at 515, citing *Wharton* and *Green I*.

In *Sandstrom*, the Court also noted that the jurors "were not told . . . that they might infer" specific intent. 442 U.S. at 515. In the present case, however, the judge instructed the jury that "you are not compelled to presume that he intended to kill from such acts but have the right to consider them in reaching a determination of his intent" (Tr. at 804). At another point, the trial judge said "the intent may be deduced from all the circumstances" (Tr. at 806). Thus, while a portion of the instructions on specific intent were clearly

III. Standard of Review

Because the appellant did not object at trial to the jury instructions here in question, we must first decide whether the errors in the instructions are of such magnitude that we can overlook what the Government claims to be his procedural default. At the outset, we note that this action is brought by a federal prisoner. Thus, problems of comity and federalism do not come into play in this matter.

Davis v. *United States*, 411 U.S. 233 (1973), is the leading case dealing with the availability of collateral relief for federal prisoners who fail to raise objections at trial. Repudiating some of the broad language in *Fay* v. *Noia*, 372 U.S. 391 (1963), the Court in *Davis* held that a federal prisoner, challenging the racial composition of the grand jury that indicted him, must show *cause* for his failure to make a timely objection as required by Rule 12(b)(2) of the Federal Rules of Criminal Procedure.[8] This cause requirement is based on Rule 12(f), which provides that failure to raise objections "shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." The Supreme Court held that, absent cause, Rule 12(b) precludes untimely

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erroneous, they may have been sufficiently qualified by subsequent instructions to be free from taint. *See United States* v. *Green* (*Green II*), 424 F.2d 912, 913 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 997 (1971); *Belton* v. *United States*, 382 F.2d 150, 154 (D.C. Cir. 1967). Because of our disposition of this case, however, we need not decide this issue.

[8] Rule 12(b)(2) provides in part:

> The following must be raised prior to trial:
>
> . . .
>
> (2) Defenses and objections based on defects in the indictment or information.

challenges to grand jury arrays, even when such challenges are on constitutional grounds. 411 U.S. at 242.

The Court in *Davis* also held that both "the reasons for the Rule and the normal rules of statutory construction" require at least as strict a standard for collateral attacks as for direct appeals. *Id.* at 240-41. Thus, the Court concluded that to allow a less stringent standard for collateral attacks would "perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings." *Id.* at 242.

Following the analysis set forth in *Davis*, we turn to Rule 30 of the Federal Rules of Criminal Procedure, which provides that

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict.

Although it does not refer to *waiver specifically*, the general thrust of Rule 30 is to foreclose the appellant from raising objections to jury instructions on appeal unless the appellant objected to the instructions at trial.

Rule 30, however, must be read in conjunction with Rule 52(b), which provides that

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Under Rule 52(b), it is clear that an appellant is not automatically barred from objecting to jury instructions on appeal where no objection has been raised at trial. Indeed, it has been consistently held in this circuit that, even though no objection was raised at trial, appellants may raise certain errors on direct

appeal. *See United States* v. *McClain*, 440 F.2d 241, 245 (D.C. Cir. 1971); *United States* v. *Williams*, 463 F.2d 958, 962 (D.C. Cir. 1972); *United States* v. *Alston*, 551 F.2d 315, 320-21 (D.C. Cir. 1976). We follow this line of authority in our consideration of this case.

Since, as the *Davis* court held, the standard for allowing a 28 U.S.C. § 2255 motion on an issue not raised at trial should be no less stringent than the standard in the Federal Rules of Criminal Procedure for review on direct appeal, we hold that the appropriate standard for review in this case is the *plain error* standard set forth in Rule 52(b).[9]

The Government also briefly argues that the trial court may dismiss a motion filed under section 2255 if the Government has been prejudiced in its ability to respond to the motion. Rule 9(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts. First, we note that the District Court did not dismiss the appellant's petition for this reason. Second, we do not find that the Government is prejudiced in *responding to the motion*. On the contrary, since no evidentiary hearing is required to decide appellant's case, the Government is quite able to respond to the motion.

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[9] Other circuits have used the plain error standard in reviewing 28 U.S.C. § 2255 motions attacking convictions based on faulty jury instructions. For example, in *Tallman* v. *United States*, 465 F.2d 282, 287 (7th Cir. 1972), the court held that it would allow collateral relief for erroneous jury instructions only if "the effect of a plain error was a miscarriage of justice."

Although we conclude that the result in this case would be the same under the "cause and prejudice" standard set forth in *Davis*, we believe that under the rationale of *Davis* the "plain error" standard is the appropriate standard for review in this case. *See* note 17, *infra*.

Third, Rule 9 also provides that the court cannot dismiss the motion if the "movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred." Even if the Government were prejudiced, the appellant, who has been incarcerated and without counsel since his conviction, was in no position to keep up with the changes in the law on the constitutionality of jury instructions. Thus we find that the trial court could not have dismissed the petition under Rule 9.

IV. Plain Error and the Malice Instructions

In several cases, this court has applied the plain error standard to appeals from convictions based on erroneous malice instructions. In *Belton* v. *United States*, 382 F.2d 150 (D.C. Cir. 1967), the trial court had instructed the jury that the law inferred malice from the use of a deadly weapon.[10] This court found no plain error and affirmed the conviction because of a conjunction of factors. First, the error involved only a single phrase that, in context, was unlikely to mislead the jury. Second, the court in *Belton* reasoned that the jury's verdict of first degree murder necessarily implied a finding of premeditation and deliberation, which in turn meant that the jury found malice despite the faulty malice instruction. *See also Howard* v. *United States*, 389 F.2d 287, 291 (D.C. Cir. 1967) (affirming a second degree murder conviction, where the jury was given the same erroneous instruction as in *Belton*, on the grounds that

[10] The court in *Belton* did not give the additional erroneous instruction, given in the present case, equating malice with specific intent.

the evidence of malice was strong and the error was partly cured by a subsequent instruction).

The holdings in *Belton* and *Howard* turned on "the over-all factual situations in those cases." *Green* v. *United States* (*Green I*), 405 F.2d 1368, 1369 (D.C. Cir. 1968). In *Green I* the trial court gave *both* of the defective malice instructions that were given in the present case. On appeal, this court reversed the defendant's first degree murder conviction. The reversal in *Green I* was obviously militated by the multiple errors in the instructions given to the jury; in noting these errors, the court observed that

> we cannot know whether the jury were guided by the correct or the incorrect portions of the instructions.

Id. at 1370. In short, the court in *Green I* found that the instructional errors raised substantial doubts that the jury's finding of premeditation necessarily implied malice.

In *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970), this court reversed a second degree murder conviction when the trial judge had given both of the erroneous malice instructions that were given in *Green I* and in the present case.[11] The court in *Wharton* found "plain error" because the trial judge had issued two erroneous instructions and the evidence of malice was equivocal. The court thus concluded that it could not determine whether the jury

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[11] Judge Leventhal, who wrote *Belton*, concurred in *Wharton*. Judge Leventhal also wrote the opinion for the court in *United States* v. *Perkins*, 498 F.2d 1054 (D.C. Cir. 1974), in which the court on direct appeal, reversed a second degree murder conviction predicated on two erroneous malice instructions. Although the opinion is silent on the point, the appellant apparently made the proper objection at trial.

found the defendant guilty of murder despite or because of the faulty instructions. *Id.* at 461.

We conclude that here also the trial judge committed plain error in issuing the two aforecited erroneous malice instructions. This conclusion is reinforced by the decision in *United States* v. *Green* (*Green II*), 424 F.2d 912 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 997 (1971), in which this court affirmed the defendant's conviction after retrial, even though the trial judge had given one of the erroneous malice instructions given in this case. The court expressly distinguished *Green II* from *Green I*, which had two erroneous instructions. *Id.* at 913. *See also Mitchell* v. *United States*, 434 F.2d 483, 488 (D.C. Cir.), *cert. denied*, 400 U.S. 867 (1970) (noting that "the cumulative effect of two erroneous malice instructions" is absent and following the distinction set forth in *Green II*); *Logan* v. *United States*, 441 F.2d 679, 681 n.10 (D.C. Cir. 1968) (distinguishing *Green I* in part because it involved a "combination of errors").

In addition to the case law in this circuit, the facts in this case and the policies underlying Rules 30 and 52(b) support our conclusion that the trial judge committed plain error affecting the appellant's substantial rights. We reiterate that the instructions given by the trial judge may well have precluded the reasonable juror from considering manslaughter as a possible verdict. Were the evidence of malice overwhelming, the error might seem harmless. But here, the evidence of malice was equivocal.[12] Based

[12] *Wharton* requires the appellate court to consider "the probable impact, appraised realistically, of the particular instructional mistakes upon the jury's factfinding function." 433 F.2d at 457.

on the verdict after trial, the jury obviously concluded that the robbery was not part and parcel of the killing.[13] Moreover, the evidence at trial indicated that the appellant did not enter the victim's house armed; he killed the victim with a weapon of chance—a piece of furniture. A manslaughter verdict—a finding that the killing was without malice—would have been consistent with this evidence. Since the trial judge was apparently satisfied that the evidence in the record warranted a jury instruction of manslaughter, it would be anomalous for us to uphold a conviction that may well have resulted from instructions foreclosing the jury from considering the alternative charge of manslaughter.[14]

We reject the Government's contention at oral argument that the erroneous instruction on presuming malice from a weapon was sufficiently qualified by other instructions. In fact, the trial judge told the jury that the weapon "is always to be taken into consideration" (Tr. at 806). This instruction was followed immediately with the trial judge's contested statement that the law presumes malice from the use of a weapon. His instructions did not qualify that presumption.[15]

We also reject the Government's argument that, as in *Belton*, a finding of premeditation implies a

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[13] The jury convicted the appellant of robbery and murder, but acquitted him of felony murder. This certainly suggests that the jury was not convinced that the appellant entered the victim's house with an intention to rob him.

[14] We note that no manslaughter instruction was given in *Belton*. *See* 382 F.2d at 155.

[15] We also follow *Sandstrom*, *supra*, which held that erroneous instructions were not cured by instructions on reasonable doubt and the presumption of innocence. 442 U.S. at 518 n.7.

finding of malice. Because the trial judge in this case compounded his errors by giving more than one plainly erroneous instruction, we are simply unable to tell whether the jury followed the correct or incorrect portion of the instructions. *See Green* v. *United States* (*Green I*), 405 F.2d at 1370.

Under these circumstances, it can hardly be doubted that the appellant was denied a substantial right. Because of the equivocal evidence at trial, and in light of all the instructions, we find the appellant suffered prejudice from the faulty instructions given by the trial judge. *See United States* v. *Pinkney*, 551 F.2d 1241, 1245 (D.C. Cir. 1976) (plain error standard required the appellate court to consider the instructions as a whole and to review the record to see whether the appellant was prejudiced by the instructions). A clear miscarriage of justice has occurred if appellant was guilty of manslaughter but is now serving the penalty for murder. *See Bearden* v. *United States*, 403 F.2d 782, 787 (5th Cir. 1968), *cert. denied*, 393 U.S. 1111 (1969) (holding that Rule 30 does "not bar invocation of Rule 52(b) where instructions have resulted in a miscarriage of justice").

While the purpose of Rule 30 is to allow the trial judge to correct trial errors before the jury retires, *United States* v. *Williams*, 521 F.2d 950, 956 (D.C. Cir. 1975), no legitimate purpose would be served by denying the appellant's 28 U.S.C. § 2255 motion in this case. At the time of his trial, the erroneous instructions were standard. Thus, appellant's counsel had every right to assume that any objection to the instructions would have been futile. To rule otherwise would be to suggest that trial counsel should object to *all* jury instructions in anticipation of

changes in the constitutionality of jury instructions.[16] Such a suggestion borders on the absurd.

We must, therefore, look to Rule 52(b) for guidance in this case. Rule 52(b) is designed to protect the criminal defendant and the integrity of the judicial process. *Herzog* v. *United States*, 235 F.2d 664, 666 (9th Cir.), *cert. denied*, 352 U.S. 844 (1956). The rule is properly invoked whenever an appellant's substantial rights to a fair trial, as here, are threatened. In the instant case, it is axiomatic that the integrity of the judicial proces will suffer if we refuse to review an appellant's claims when he may, in fact, have been convicted of the wrong crime.[17]

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[16] A separate issue here concerns whether the new rule, finding the instructions erroneous, should be applied retroactively. *See* section V, *infra*.

[17] Parenthetically, we address the Government's contention that the proper standard for review in this case is the "cause and prejudice" standard set forth in *Davis*, *supra*. Even assuming that the *Davis* standard applied, we find that Frady has met that standard. This standard bars federal habeas corpus review of constitutional claims absent a showing of cause for noncompliance with the applicable procedural rule—in this case objection at trial to the jury instructions—and some showing of actual prejudice resulting from the alleged constitutional violation. *See also Francis* v. *Henderson*, 425 U.S. 436 (1976) (applying standard to state prisoner), and *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) (same).

There was sufficient *cause* for appellant's failure to object at trial to the jury instructions. It was not until four years after his conviction that the challenged malice instructions were found to be erroneous, requiring reversal. It is unrealistic to expect that counsel would have made the futile gesture of objecting to what, at that time, were standard instructions. As noted above, to require counsel to anticipate future constitutional rulings would encourage the mean-

V. Retroactivity

The only remaining issue to be resolved here is whether the rule announced in *Wharton* and *Green I* should be applied retroactively in this case. We hold that it should.

The Supreme Court recently discussed the retroactivity of holdings declaring certain jury instructions violative of due process. In *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), the Court held that its decision in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), condemning instructions that created a presumption of malice, was to be applied to a defendant who had been convicted before the Court decided *Mullaney*.

Quoting previous cases, the Court in *Hankerson* noted that:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the

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ingless task of objecting to every instruction in order to protect the defendant's constitutional rights.

The Government's characterization of counsel's failure to object as a trial tactic is unpersuasive. Competent counsel will object to those instructions that he or she believes might be erroneous, whatever the theory of the case. Moreover, Frady's counsel on direct appeal, who was also the trial attorney, made no attempt to exploit his "mistake."

The appellant was plainly *prejudiced* by the instructions given by the trial judge. As mentioned above, the evidence of record was consistent with a finding of manslaughter. Had the jury been properly instructed on both malice and specific intent, we cannot say whether they would have reached the same result. As in *Wharton* and *Green I* the defendant here has suffered sufficient prejudice to warrant reversal of his conviction.

> accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

Id. at 241.

The *Mullaney* holding, eliminating the presumption of malice, is "designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that 'substantially impairs the truth-finding function.'" *Id.* at 242. The Court emphasized that the key elements of the test for retroactivity are that the error *substantially* impaired the truth-finding process, and that it raised *serious* questions about the accuracy of the guilty verdict. *Id.* at 243.

In *Hankerson*, the Court found that the *Mullaney* holding fit that test, for the instructions issued by the trial judge had shifted the burden of proof to the defendant.[18] The Court found this shift to violate the mandate of *In re Winship*, 397 U.S. 358 (1970), that each element of a crime must be proved beyond a reasonable doubt. Here, too, as the Government conceded at oral argument, the presumption expressed in the malice instructions lightened the Government's burden of proof in its case against appellant. To the reasonable juror, the presumption in the present case may have been no less influential than the rebuttable presumption in *Hankerson*. Given the equivocal nature

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[18] The state law in *Mullaney* presumed malice under certain circumstances, leaving it to the defendant to prove an absence of malice in order to secure a manslaughter rather than a murder conviction. 421 U.S. at 686.

of the proof in the case, and the misleading instructions on malice, we find that the truth-finding function was substantially impaired, raising serious questions about the accuracy of the jury's verdict. Thus, we hold that the rules announced in *Wharton* and *Green I* must be given retroactive application in this case.[19]

The Government may have some concerns about the effect of this holding on the administration of justice. The Court in *Hankerson*, however, was quite clear that "the severe impact on the administration of justice" was not enough to "require prospective application" of the new rule when the other criteria for retroactivity have been met. 432 U.S. at 241, 243. Thus, while we recognize the Government's interest in the outcome of this case, we note that the appellant would be at least as prejudiced by the opposite outcome, for he has been denied the opportunity to be fully and fairly tried for manslaughter as well as murder.

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[19] Footnote 8 in *Hankerson* suggests that the Court's holding on retroactivity will not unduly burden the state courts since most defendants will not have objected to the instructions at trial, thus precluding them from raising the issue on appeal or in habeas corpus proceedings. However, the statement in this footnote is not inconsistent with the decision in this case. First, *Hankerson* involved an appeal from a denial of habeas corpus to a *state* prisoner. Properly, the Court was concerned about issues of comity and federalism that are not present in the instant case. Second, under the Federal Rules of Criminal Procedure, failure to object to jury instructions at trial only changes the standard of review to "plain error." *See* note 9, *supra*. As we have held in this opinion, the jury instructions in this case amounted to plain error.

VI. Conclusion

The District Court's order denying the appellant's motion to vacate the sentence is reversed, and the case remanded to the District Court for a new trial on the first count of the indictment. Because retrial after so many years may be difficult for either the Government or the appellant, if the Government consents, and the trial court considers it to be in the interest of justice after hearing from both parties, the trial judge may enter a judgment of manslaughter. *See United States* v. *Wharton*, 433 F.2d 451, 461 (D.C. Cir. 1970).

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS

September Term, 1979

Criminal No. 402-63

No. 79-2356

UNITED STATES, APPELLEE

v.

JOSEPH C. FRADY, APPELLANT

Filed August 4, 1980

Appeal from the United States District Court for the District of Columbia

Before: McGOWAN and EDWARDS, Circuit Judges, and FRIEDMAN *, Chief Judge United States Court of Claims

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded to the District Court for a new trial on the first count of the indictment, in accord-

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

ance with the opinion of this Court filed herein this date.

For the Court
Per Curiam

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: August 4, 1980

Opinion for the Court filed by Circuit Judge Edwards

A true copy:
Test: George A. Fisher

United States Court of Appeals
for the District of Columbia Circuit

Atlanta, Ga.

By:
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2356

UNITED STATES OF AMERICA

v.

JOSEPH C. FRADY, APPELLANT

ON SUGGESTION FOR REHEARING EN BANC

(D.C. CRIMINAL NO. 402-63)

Filed October 22, 1980

Before: WRIGHT, *Chief Judge:* MCGOWAN, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS AND GINSBURG, *Circuit Judges.*

ORDER

The suggestion for rehearing *en banc* filed by appellee having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that appellee's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

STATEMENT ON DENIAL OF REHEARING EN BANC

TAMM, MACKINNON, ROBB, and WILKEY, *Circuit Judges*: We would grant a rehearing *en banc* in *United States* v. *Frady* (*Frady* III), No. 79-2356 (D.C. Cir., 4 Aug. 1980), to ascertain whether the standard of judicial review upon collateral attack (under 28 U.S.C. § 2255 (1976)) of a criminal conviction was properly applied by the panel in *Frady* III. The panel set aside a sixteen-year-old conviction for deliberate and premeditated, first-degree murder—a conviction which was affirmed fifteen years ago on direct appeal to this court sitting *en banc*, 348 F.2d 84 (D.C. Cir. 1965) (*en banc*) (one judge dissenting)[1] (*Frady* I), and for which certiorari was denied by the Supreme Court, 382 U.S. 909 (1965).

We submit that finality of criminal convictions where justice has been done is such a basic social interest that all judges must observe scrupulously and responsibly the substantial distinction between standards of direct and collateral review of criminal convictions. We believe it is manifest that a court should not *on collateral review* attack in isolation one aspect of a criminal trial and overturn a jury verdict (for which an appellate court *en banc* found there to be sufficient supporting evidence). A court must "view the [jury] charge itself as part of the whole trial," *United States* v. *Park*, 421 U.S. 658, 674 (1975), to judge whether justice was served or disserved.

The facts in *Frady* are unpleasant: On 13 March 1963 the victim Bennett was unmercifully assaulted

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[1] Chief Judge Bazelon and Judges Miller, Fahy, Washington, Danaher, Bastian, Burger, and McGowan concurred in affirming the first degree conviction. Only Judge Wright dissented.

and murdered in his home. "His head had been caved in by several blows from a blunt instrument and a mixture of blood and brains was coming from the wounds. . . . One of the victim's eyes had been knocked from its socket and was lying on his cheek when the officers arrived." *Frady* I, *supra*, 348 F.2d at 100. This battering, mayhem, and murder needed ten minutes, during which time a neighbor summoned police. They arrived in time to see Frady and codefendant Gordon run from the house and into a waiting car. Frady and Gordon, covered with blood, were arrested shortly thereafter.

On trial this evidence—and other amplifying details as to motive, plan, and preparation—was sufficiently convincing for the jury to return a verdict of guilty on the greatest offense charged—first-degree, premeditated, deliberate murder—and to earn Frady the death penalty, later set aside by a 4-3 vote in *Frady* I, *supra*. The prosecution's evidence proved Frady and Gordon were contract killers; the defense theory, at trial, disclaimed any responsibility or involvement. *The defense made no claim of self-defense or reduced culpability, but, rather, theorized that a third man was in fact the real murderer* and, the defendant did not himself testify, thus waiving any opportunity to give any support whatsoever, then or now, to a defense based on reduced culpability. *See* Brief for Appellee United States of America (*Frady* I, Nos. 18,357 & 18,358) at 10-13; Trial Transcript at 793-99.

Fourteen years after Frady's conviction was affirmed he challenged an instruction to the jury delivered by the trial judge. He predicated the asserted error in that part of the charge where the judge instructed that the law "infers or presumes" the "exist-

ence of the malice essential to culpabable homicide" from the "use of [a deadly] weapon in the absence of explanatory or mitigating circumstances." (Trial Transcript at 806). The trial court instructed the jury also, of course, as to the meanings of premeditation and deliberation, and instructed that these two elements were prerequisite to a conviction for first-degree murder and must be found by the jury beyond any reasonable doubt. The jury handed in a verdict finding premeditation and deliberation—in other words, the jury went *far beyond* the "malice" essential to find a defendant guilty of a murder in any degree and actually found Frady guilty of first-degree premeditated and deliberate murder. This court *en banc* upheld the jury verdict of first-degree murder, holding the evidence legally sufficient to find murder in that degree.

Frady now claims, before the *Frady* III panel, that is, that the jury was denied the chance to reach a reduced culpability verdict, in other words, that a finding of manslaughter in lieu of murder was precluded. We note, as did the *Frady* III panel (slip op. at 4), that the elements of first-degree murder include malice, specific intent, and premeditation; the elements of second-degree murder include malice but no premeditation; while manslaughter encompasses all other unlawful killings done without malice. So "malice" does segregate first- and second-degree murder categories from the category of manslaughter. "Malice" does not, however, distinguish between first- and second-degree murder—the jury reached a verdict of *first, degree murder*, finding *premeditation* and *intent. A verdict of manslaughter is inconceivable, especially when no defense theory turning on self-defense, re-*

duced culpability, or extenuating circumstances was adduced as limiting the responsibility of the defendants. See United States v. *Green* (*Green* II), 424 F.2d 912 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 997 (1971) ("it is inconceivable that the jury that found the appellant guilty of deliberate and premeditated murder would have failed to find malice . . .").

As the *Frady* III opinion outlines, the "malice" instruction was adjudged erroneous in subsequent (*i.e.*, post-*Frady*) decisions of this Circuit. The contention we make here in support of our position to grant the rehearing *en banc* imports absolutely no claim that the jury instruction regarding "malice" in *Frady* should now be deemed the current and proper standard. We only note that the cases (*e.g.*, *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970); *Green* v. *United States* (*Green* I), 405 F.2d 1368 (D.C. Cir. 1968)), holding that instruction to be invalid were themselves all on *direct appeal* from guilty verdicts and not upon collateral attacks pressed years and years after trial.

Frady was represented at trial by an attorney. Counsel, in derogation of Fed. R. Crim. P. 30, never raised the issue of erroneous jury charge at trial or on direct appeal. No miscarriage of justice or prejudice to the defendant is apparent under these circumstances, as viewed by the jury finding first-degree murder and this court affirming that verdict. In *Frady* II the erroneous jury charge was considered in isolation from the trial as a whole and from justice in the end. *Frady* III was not an appeal; it was a collateral review whose purpose is to ensure against a fundamental miscarriage of justice and, therefore, should have focused on *all* evidence of guilt and the conduct of the trial as a whole before overturning a conviction, *see Wainwright* v. *Sykes*, 433 U.S. 72,

88-91 (1977); *Cupp* v. *Naughten*, 414 U.S. 141 (1973). The Supreme Court in *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977), laid down the different and enhanced standard of error required to be proved:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment [*see Sunal* v. *Large*, 332 U.S. 174, 178 (1947) (collateral attack will not serve as appeal for *federal* convictions)] is even greater than the showing required to establish plain error in direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Cupp* v. *Naughten*, 414 U.S., at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" *id.*, at 146.

Regrettably, the panel in *Frady* III found it necessary to mischaracterize the proof in the record as "equivocal" in order to sustain its extraordinary result. "Equivocal" was not the way the first court and this court *en banc* (*Frady* I) saw it. Judge Miller, with whom joined Judges Bastian, Danaher, and Burger, writing in *Frady* I, stated:

> The court cannot set aside the verdict of the jury unless the evidence was insufficient to sustain it or unless prejudicial error occurred during the progress of the trial. From what has been said, *it is apparent that the evidence amply supported the verdict*; and there is no prejudicial error in the record. The able District Judge conducted the trial in exemplary fashion, and

> charged the jury in a manner which was beyond criticism. *The appellants had no real defense* and there is no real reason shown on appeal why they should not pay that penalty [*i.e.*, capital punishment] for their atrocious crime which the law provides and the jury imposed.

348 F.2d at 111 (emphasis added). On this point we suggest that the panel 15 years later (*Frady* III) is bound by our *en banc* decision and not free to redetermine on this collateral attack what was settled *en banc* on direct appeal. The evidence which this court sitting *en banc* found sufficient to support a verdict of first-degree murder simply cannot fairly be described as "equivocal." Judge McGowan, in *Frady* I, also "share[d] the view that the *convictions of appellants should be affirmed.*" 348 F.2d at 91. Whereas he could not approve the death penalty, this was, Judge McGowan said, "*not because I believe there were errors in the instructions . . . .*" *Id.* (emphasis added).

One other mischaracterization of the record, important to the panel's line of reasoning, must be refuted. The opinion asserts: "Were the evidence of malice overwhelming, the error [in the instructions] might seem harmless. But here the evidence of malice was equivocal. Based on the verdict after trial, the jury obviously concluded that the robbery was not part and parcel of the killing [footnotes omitted]," citing in support of this that the jury acquitted Frady of felony murder. Slip op. at 11.

Nowhere in the opinion does the panel mention that Frady had driven past the victim's house two separate times that day, nor that Frady's co-murderer, Gordon, had picked up a pair of gloves before entering the house, so that "[s]ignificantly,

the murder weapon bore no fingerprints." 348 F.2d at 101 n.3, and 103. And, as anyone familiar with trial instructions might guess, the jury's failure to convict on felony murder was *not* for lack of malice, as the panel implies, *but because the trial judge properly instructed the jury that it could not find the defendants guilty of both felony murder and first-degree premeditated murder* (Trial Transcript at 803). The verdict clearly reflected the jury's belief that Frady entered the house intending not to rob, but to kill, *i.e.*, that there was malice aplenty. There was malice and evidence so overwhelming as originally to justify imposing the death penalty. In light of the evidence it is inconceivable that the trial could have been fatally infected by two short phrases in the court's charge.

Using the standard of direct appeal instead of collateral review; ignoring the *en banc* decision of this court on direct appeal; mischaracterizing evidence this court had found to be clear, convincing and sufficient; misconstruing the jury's acquittal on the felony murder count; misinterpreting and misapplying recent Supreme Court cases on instructions, plain error, and retroactivity to be accorded; this panel of our court has managed to free at last a brutal contract killer originally thought worthy of the death penalty. The rest of the court should awake to what has taken place.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Number 402-63

UNITED STATES

v.

JOSEPH C. FRADY

Filed Sep. 20, 1979

ORDER

This cause came on the *pro se* motion of petitioner to vacate and set aside his sentence pursuant to 28 U.S. Code § 2255, and it appearing to the Court that the petitioner has previously filed motions for similar relief on July 9, 1965 and on January 3, 1975, and that following trial and conviction petitioner filed an appeal to the United States Court of Appeals for the District of Columbia (*See* Frady v. United States, 121 U.S. App. D.C. 78, 348, F.2d 84 (en banc), *cert. denied*, 382 U.S. 909 (1965)) in which matters raised by this motion were raised or could have been raised, and it further appearing to the Court that the files and records conclusively show that petitioner is entitled to no relief, it is hereby, by this Court, this 20th day of September, 1979,

ORDERED, that the *pro se* motion of petitioner be, and the same hereby is, denied.

/s/ George L. Hart, Jr.
GEORGE L. HART, JR.
United States District Judge

★ U. S. GOVERNMENT PRINTING OFFICE: 1991 338520 266

Office-Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1595

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Petitioner

v.

JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

PETITION FILED MARCH 20, 1981
CERTIORARI GRANTED JUNE 29, 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1595

UNITED STATES OF AMERICA,

Petitioner

v.

JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The judgment order of the district court (Sept. 20, 1979), the opinion and judgment of the court of appeals (Aug. 4, 1980), and the order denying rehearing in the court of appeals and the statement of the judges dissenting from the denial of rehearing (Oct. 22, 1980) are printed as appendices to the petition for a writ of certiorari (Pet. App. 1a-29a).

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 402-63

UNITED STATES

vs.

1. JOSEPH C. FRADY
2. RICHARD A. GORDON

DATE	PROCEEDINGS
	• • • •
1963	
Apr 29	PRESENTMENT AND INDICTMENT FILED (3 Counts)
	• • • •
Oct 29	JURORS SWORN ON VOIR DIRE; JURY AND FOUR ALTERNATE JURORS SWORN:
	• • • •
	Case is RESPITED until 10:00 a.m. to-morrow;
	• • • •
Oct 30	TRIAL BEGUN; same jury and four alternate jurors; Case is RESPITED until 10:00 a.m. to-morrow;
	• • • •
Oct 31	TRIAL RESUMED; same jury and four alternate jurors; Case is RESPITED until 10:00 a.m., Monday, Nov. 4, 1963.
	• • • •
Nov 4	TRIAL RESUMED from 10-31-63; same jury and four alternate jurors; Case is RESPITED until 10:00 a.m. to-morrow;
	• • • •

DATE	PROCEEDINGS

1963

Nov 5 TRIAL RESUMED; same jury and four alternate jurors; Case is RESPITED until 10:00 a.m. to-morrow;

* * * *

Nov 6 TRIAL RESUMED; same jury and four alternate jurors; Case is RESPITED until 10:00 a.m. to-morrow;

* * * *

Nov 7 TRIAL RESUMED; same jury and four alternate jurors; Jury charged; Alternate Jurors discharged; JURY RETIRES to consider their verdict; VERDICT: NOT GUILTY on Count 2; GUILTY as charged of FIRST DEGREE MURDER on Count 1; GUILTY as charged (Robbery) on Count 3; JURY POLLED; December 6, 1963 set as sentencing date (to give defendant time to file motions);

* * * *

Nov 14 No. 1,2: MOTION of DEFENDANT for New Trial and other relief, filed. Cert. of Serv.

* * * *

Nov 22 No. 1,2: MOTION of DEFENDANT for new trial and other relief heard, argued and DENIED; Hearing on other matters set for 1:45 P.M., Wed. Nov. 27.;

* * * *

Nov 27 No. 1,2: AFFIDAVIT of Dorrice Frances Brenner, filed. Hearing based on Affidavit of Dorrice Frances Brenner as to any impropriety in trial; MOTION for new trial and other relief reheard, reargued & DENIED;

* * * *

Dec 6 SENTENCED to imprisonment for a period of FIVE (5) YEARS to FIFTEEN (15) YEARS on Count 3; DEATH BY ELECTROCUTION on February 7, 1964 on Count 1. Defendant notified in open Court that he has TEN (10) days in which to file an appeal. Defendant REMANDED to the District of Columbia Jail; Attorney Henry L. Johnson present. Judgment & Commitment for electrocution, filed. HART, J. (Reporter Robert Henderson)

DATE	PROCEEDINGS

1963

Dec 10 No. 1,2: JUDGMENT & COMMITMENT of 12-6-63, filed. HART, J.

Dec 13 No. 1,2: ORDER STAYING JUDGMENTS in the event of an Appeal, filed. HART, J. MOTION of DEFENDANT for leave to prosecute appeal in Forma Pauperis filed and GRANTED. HART, J. NOTICE OF APPEAL, filed.

* * * *

1965

May 24 No. 1,2: MANDATE from the United States Court of Appeals AFFIRMING the Conviction of FIRST DEGREE MURDER and ROBBERY AND SETTING ASIDE the DEATH SENTENCE and REMANDING case to the District Court with directions for RESENTENCING of LIFE IMPRISONMENT on the verdict of Guilty of First Degree Murder, filed. (C.A. 18357 & 18358) OPINION, FILED.

* * * *

Jun 18 No. 1,2: Sentence of Death By Electrocution on February 7, 1964 on Count 1, imposed on Dec. 6, 1963, SET ASIDE pursuant to MANDATE from the UNITED STATES COURT of APPEALS for the District of Columbia, FILED, May 24, 1965; SENTENCED to imprisonment for HIS NATURAL LIFE on Count 1; Sentence of imprisonment for FIVE (5) YEARS to FIFTEEN (15) YEARS on Count 3, imposed on Dec. 6, 1963, to RUN CONSECUTIVELY to the LIFE SENTENCE IMPOSED ON COUNT 1; COURT RECOMMENDS IMPRISONMENT in a FEDERAL INSTITUTION. Defendant REMANDED to the District of Columbia Jail; Attorney Henry L. Johnson present. HART, J. (Reporter-G. Davis)

Jun 22 No. 1,2: JUDGMENT & COMMITMENT of 6-18-65, filed. HART, J.

DATE	PROCEEDINGS

1965

Jun 22 No. 1,2: ORDER SETTING ASIDE THE SENTENCE IMPOSED on 12-6-63 of DEATH BY ELECTROCUTION ON 2-7-64 on Count ONE, filed. (N) HART, J.

Jul 2 No. 1,2: Motion of Defendant to vacate sentence, filed. Affidavit of Defendant in support of application for leave to proceed on Appeal without prepayment of costs, filed. (Prepared by Deft.)

Jul 9 No. 1,2: MOTION to vacate sentence filed on 7-2-65 DENIED. (N) HART, J. AFFIDAVIT in support of application to proceed ON APPEAL without prepayment of costs filed on 7-2-65, DENIED as frivolous and not taken in good faith. HART, J. (N)

Jul 12 No. 1: Letter from Defendant in the nature of a motion for rediction [sic] of sentence DENIED and filed. HART, J. fiat (N)

* * * *

Jul 23 No. 1: LETTER from DEFENDANT dated 7-19-65 in the nature of Renewed Motion to reduce sentence, filed and DENIED. HART, J. (N)

Aug 2 No. 1: Letter from Defendant in the nature of motion for reduction of sentence, filed. (Prepared by Deft.)

* * * *

1966

Apr 27 No. 1: Motion of Defendant for reduction of sentence, filed 8-2-65, denied 4-27-66, filed. (N) HART, J.

* * * *

1974

Oct 21 #1: PETITION of defendant for sentence modification—"DENIED". (Fiat) (N) HART, C.J.

DATE	PROCEEDINGS

1975

Jan 3 #1: PRO SE motion to vacate sentence and set aside conviction under Title 28 USC 2255 given C.A. #74-0008; Affidavit; C/S

Jan 3 #1: ORDER denying the pro se motion of deft. to vacate and set aside sentence pursuant to Title 28 USC 2255. (N) HART, C.J.

Feb 12 #1: NOTICE of appeal from Order of 1-3-75 denying motion to vacate sentence. $5.00 paid and credited to U.S.

* * * *

May 9 #1: CERTIFIED copy of Order U.S.C.A. dated 5-8-75 granting motion for voluntary dismissal pursuant to FRAP 42(b) and dismissing the appeal.

* * * *

1976

Dec 13 #1: LETTER dated 12-10-76 from Deft. in the nature of a motion to reduce sentence. Denied; (Fiat) (N) HART, J.

1978

Jun 19 #1: MOTION, pro se, to vacate illegal sentence pursuant to Rule 35-Denied. (Fiat) (N) HART, J.

July 7 #1: NOTICE of appeal, pro se from ruling of 6-19-78; Leave to file denied; not timely. (Fiat) (N) HART, J.

Nov 9 #1: COPY of Order U.S.C.A. dated 11-8-78 denying motion for leave to proceed in forma pauperis.

1979

Mar 14 #1: COPY of Order from U.S.C.A. dated 3-14-79 directing the District Court to file nunc pro tunc 7-7-78 the Notice of Appeal of Deft. from the Order of the District Court of 6-19-78 denying the motion to correct an illegal sentence and further directing the District Court to transmit the record on Appeal as soon after the filing of the Notice of Appeal as business of Court permits. Memorandum attached.

DATE	PROCEEDINGS

1979

Mar 14 #1: NOTICE of Appeal from denial of pro se motion entered 6-19-78 nunc pro tunc 7-7-78.

Mar 14 #1: COPY of Notice of Appeal to U.S.C.A., U.S. Atty and Deft. COPY of Docket Entries to U.S.C.A. and U.S. Atty.

* * * *

July 31 #1: CERTIFIED copy of Judgment from U.S.C.A. dated 6-8-79 vacating Judgment of U.S. District Court and remanding case to the U.S. District Court for further proceedings consistent with Opinion; Opinion attached.

* * * *

Aug 3 #1: ORDER directing that the robbery sentence of five (5) to fifteen years shall run concurrently with the life sentence to which it is related, rather than consecutively. (M) HART, J.

Sept 18 #1: MOTION, pro se, to vacate, set aside or correct sentence; pursuant to Title 28 U.S.C. 2255, P/A; Affidavit.

Sept 21 #1: ORDER denying pro se motion to vacate and set aside sentence pursuant to 28 USC 2255. (N) HART, J.

Nov 13 #1: NOTICE of appeal by deft. from denial of Motion 28 USC 2255 entered Sept. 21, 1979. USCA #79-2356

* * * *

1980

Oct 17 #1: CERTIFIED copy of Judgment U.S.C.A. dated 8-4-80 reversing and remanding case to the District Court for a new trial on the 1st Count of the Indictment in accordance with the Opinion. Opinion attached.

* * * *

DATE	PROCEEDINGS

1981

Jan 22 WRIT of Habeas Corpus Ad Pros. for production of Joseph C. Frady on or before January 10, 1981, ordered and issued.

* * * *

Feb 3 #1: REMAND HEARING pursuant to Order U.S.C.A. for release of Deft. Court Orders release of Deft. on per. recog. with conditions. Rep: R. Griffey HART, J.

Feb 3 #1: ORDER for release of Deft. on per. recog. with 3rd party custody and conditions. Deft. released—release issued. (See att'd Order) HART, J.

* * * *

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 79-2356

UNITED STATES OF AMERICA

v.

JOSEPH C. FRADY, APPELLANT

DATE	FILINGS—PROCEEDINGS
(B) 11-15-79	Copy of notice of appeal and docket entries from District Court (n-2)
	* * * *
(E) 6-13-80	Argued before McGowan*, Edwards, CJ's and Friedman, US Court of Claims
(R) 8-4-80	Opinion for the Court filed by Circuit Judge Edwards
(R) 8-4-80	Judgment reversing and the case is remanded to the U.S. District Court for a new trial in accordance with the opinion of this Court filed herein this date
	* * * *
(T) 08-18-80	4-Appellee's motion to extend time to file petition for rehearing to September 17, 1980 (m-18)
	* * * *
(B) 09-09-80	Per Curiam order that appellee's motion to extend time is granted and that the time within which parties may file a petition for rehearing is extended to and including 9-17-80; McGowan and Edwards, CJ's; and Friedman, CJ, US Court of Claims
(T) 9-17-80	15-Appellee's petition for rehearing and suggestion for rehearing, en banc (m-17)
	* * * *

DATE	FILINGS—PROCEEDINGS

(H) 10-22-80 Opinion for the Court filed by Tamm, MacKinnon, Robb and Wilkey, CJ's

(H) 10-22-80 Per Curiam order, en banc, denying appellee's suggestion for rehearing, en banc; CJ Wright, McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJ's

(H) 10-22-80 Per Curiam order denying appellee's petition for rehearing; McGowan and Edwards, CJ's; and Friedman, CJ, US Court of Claims

* * * *

MOTION FOR RELIEF: 28 U.S.C. 2255

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Sep. 18, 1979]

Criminal No. 402-63

UNITED STATES
vs.
JOSEPH C. FRADY

* * * *

MOTION

1. Name and location of court which entered the judgment of conviction under attack United States District Court—Washington, D.C.

2. Date of judgment of conviction Dec. 6, 1963 (original) June 18, 1965 (resentence)

3. Length of sentence Death (original) 20 years to life (resentence)

4. Nature of offense involved (all counts) First degree murder premeditated. Robbery—not challenged herein.

5. What was your plea? (Check one)
   (a) Not guilty (✓)
   (b) Guilty ( )
   (c) Nolo contendere ( )

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one)

   (a) Jury (✓)
   (b) Judge only ( )

7. Did you testify at the trial? Yes ( ) No (✓)

8. Did you appeal from the judgment of conviction? Yes (✓) No ( )

9. If you did appeal answer the following:

   (a) Name of court US Court of Appeals for D.C. Circuit
   (b) Result Remand for re-sentence on murder—convictions affirmed
   (c) Date of result 1965

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any Federal court? Yes (✓) No ( ) information.

11. If your answer to 10 was "yes", give the following information.

   (a) (1) Name of court US District Court—Washington, D.C.
   (2) Nature of proceeding Title 28-2255 motion to vacate
   (3) Grounds raised Pretrial publicity—inadmissible grand jury testimony
   (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (✓)
   (5) Result Denied—frivolous
   (6) Date of result Dec. 13, 1966

   (b) As to any second petition, application or motion give the same information:

(1) Name of court _____
(2) Nature of proceeding _____
_____
(3) Grounds raised _____
_____
_____
_____
_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )
(5) Result _____
(6) Date of result _____

(c) As to any third petition, application or motion give the same information:

(1) Name of court _____
_____
(2) Nature of proceeding _____
(3) Grounds raised _____
_____
_____
_____
_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )

(d) Did you appeal, to an appellate Federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ( ) No (✓)
(2) Second petition, etc. Yes ( ) No ( )
(3) Third petition, etc. Yes ( ) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: In view of court's ruling frivolous felt no merit
_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Triple constitutional errors in malice instructions.

Supporting FACTS (tell your story *briefly* without citing cases or law): The courts instruction on malice contained two unconstitutional presumptions shifting the burden of persuasion to petitioner and inviting finding of required malice on less than proof beyond reasonable doubt. Additionally malice instruction mistakenly equated malice with intent. See supporting memorandum for details.

B. Ground two: Failure to instruct on essential element of first degree murder.

Supporting FACTS (tell your story *briefly* without citing cases or law): The court failed to instruct that specific intent must be proved beyond reasonable doubt. Failed to define intent. See supporting memorandum for detailed argument.

C. Ground three: Unconstitutional presumption in instruction on intent. Also instruction allowed finding of general intent sufficient.

Supporting FACTS (tell your story *briefly* without citing cases or law): The court charged an unconstitutional presumption in the intent charge inviting jury to presume essential element. Also presumption allowed finding requisite intent on mere use of weapon—general intent. See supporting memorandum.

D. Ground four: Failure to define "reclessness" [sic] as element of malice in second degree murder. Supporting FACTS (tell your story *briefly* without citing cases or law): For facts and relation to preceeding multiple constitutional errors. Please see detailed supporting memorandum. Multi-errors supra combined to infect consideration of premeditation and deliberation.

13. If any of the grounds listed in 12A, B, C and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: Combination of constitutional errors infected truth seeking function of trial and denied in due process of law. Prejudice, procedural default—waiver doctrine—retroactivity, supporting affidavit—discussed, and attached in memorandum supporting petition.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack:

Yes ( ) No (✓) not as to first degree murder.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Mr. Henry Lincoln Johnson Esq. Address unknown

(b) At arraignment and plea Same as above

(c) At trial Same as above

(d) At sentencing Same as above

(e) On appeal Same as above

(f) In any post-conviction proceeding None

(g) On appeal from any adverse ruling in a post-conviction proceeding None

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes (✓) No ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ( ) No (✓)

(a) If so, give name and location of court which imposed sentence to be served in the future:

_____

_____

(b) And give date and length of sentence to be served in the future: _____

_____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ( ) No (✓)

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

I certify under penalty of perjury that the foregoing is true and correct.

9-6-79	/s/ Joseph C. Frady
Date	Movant's Signature
/s/ Carl Deer	02013-135
CARL DEER	Prison Number
Case Manager	
Authorized By The Act	
of July 27, 1955 To	
Administer Oaths	
(18 U.S.C. 4004).	Atlanta, Ga.
	Place of Confinement

INSTRUCTIONS TO THE JURY

[793] The Court[:] Ladies and gentlemen of the Jury, I will try to give my charge to you slowly so that you will understand it. When I get to that portion of my charge which deals with the specific crime it gets a bit complicated so I ask you to listen with particular deliberate attention to that part of the charge. Of course, you should listen to all of it with great attention but that is the complex part of it and I will read that very slowly so that you will understand it.

Now, as you know, we have reached that stage where it becomes my duty to charge you on the law of the case, which charge you are required to follow in exercising your duty to pass the facts of the case.

Before going into the principles of law which will govern you in your deliberations, I will discuss briefly the participants in the trial and the duty which each of us has.

As to counsel for the Government, you heard counsel for the Government make an opening statement wherein the counsel for the Government told you what the Government expected to prove. His statement as to what the Government expected to prove does not constitute evidence in the case.

At the close of the case, counsel for the Government and counsel for the defendants made what we refer to as summations to the Jury. They of course, did not undertake to discuss all the evidence in the case but they did discuss the evidence that constituted their recollection of that part of the evidence which they thought you should give special consideration. If your recollection disagrees with their recollection, your recollection is controlling as you are the sole judges of the issues of fact.

[794] Now, during the course of the trial there were occasions when there were colloquies between counsel and between counsel and the court in connection with which

there may have been statements of alleged fact. Quite obviously, these statements do not constitute evidence.

The function of the court is to conduct the trial of the case in an orderly and efficient manner and to rule upon questions of law during the course of the trial and, finally, to charge you with respect to the law which will control you in the determination of the issues of the fact which you have to decide.

You are not to draw any inference nor are you to be influenced with respect to the guilt or innocence of the defendants by any ruling of this court during the course of the trial. The court made rulings of law and thereby disposed of the questions that were presented either dealing with the admissibility or inadmissibility of evidence or the other questions that did arise during the course of the trial. There is nothing that the Court has said during the course of the trial or that will be said during this charge which should carry with it any suggestions as to how the court feels the case should be decided because, as I have said before, you are the sole judges of the issues of fact in this case, and for me to suggest how you should decide the case would constitute a wholly unwarranted assumption of your prerogatives in the case. In reaching your decision as to the facts in this case, you must base your judgment upon the evidence which you have heard from the witness stand, the exhibits which been received in evidence, and the inferences which reasonably deducib from that evidence, that is the testimony and the exhibits.

[795] Now, the defendants have been indicted in this case charged in two counts with first degree murder; one, the first count, being first degree murder of a nature that involves premeditation: the second count, what we felony murder; and the third count; robbery.

A little later on I will read the indictment to you but I wish to say and emphasize at this point that the fact of their indictment raises no inference of guilt. The in-

dictment is the method whereby the defendants are brought to trial and by which they are informed of the charges made against them. It is not evidence in the case.

Now, every defendant in a criminal case is presumed to be innocent, and this presumption of innocence attaches to a defendant throughout the trial. The burden is on the Government to prove the defendants guilty beyond a reasonable doubt and if the Government fails to sustain this burden, then you must find the defendants not guilty. [796] You may well ask, what do we mean by a reasonable doubt. It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainly and not necessarily proof to a mathimatical [sic] certainly [sic]. A reasonable doubt is one which is reasonable in view of all the evidence. There for, if, after impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied with the guilt of the defendants, or either of them, then as to such defendant you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence and giving due consideration to the presumption of innocence which attaches to the defendants, you can truthfully say that you have an abiding conviction of the defendants' guilt, or one of them, such as you would be willing to act upon in the more weighty and important matters relating to your personal affairs, then as to such defendant you have no reasonable doubt.

Now, in determining whether the Government has established the charges against the defendants beyond a reasonable doubt, you will consider and weigh the testimony of all the witnesses who have testified before you and all the circumstances concerning which testimony has been introduced.

You are also the sole judges of the credibility of witnesses. In other words, you and you alone are to determine whether to believe any witness and the extent to which any witness should be credited. In case there is a conflict in the testimony, it is your function ro [sic] resolve the conflict and to determine where the truth lies.

[797] In reaching a conclusion as to the credibility of any witness and in weighing the testimony of any witness, you may consider any matter that may have a bearing on the subject. For instance, you may consider the demeanor and the behavior of the witness on the witness stand, the witnesses' manner of testifying, whether the witness impressed you as a truth-telling individual, whether the witness impressed you as having an accurate memory and recollection, whether the witness had any motive for not telling the truth, whether the witness had full opportunity to observe the matters concerning which the witness has testified and whether the witness has any interest in the outcome of this case. If you find that any witness wilfully testified falsely as to any material fact concerning which the witness could not reasonably have been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of such witness or any part of the testimony of such witness.

Now, in this case there has been evidence that one of the witnesses, namely Atkins, has a criminal record. I tell you that that was admitted in evidence solely for your consideration in passing on the credibility of Atkins. It was not received as having any bearing upon whether the defendants in this case were guilty of the charges made against them. The only reason for receiving it, the only reason it could be received, was because it might have some bearing on Atkins' credibility as a witness as you must pass upon that credibility.

[798] Now, in criminal cases, there are two types of evidence. One type is known as direct evidence and the other type of evidence is known as circumstantial evidence.

By direct evidence is meant evidence of eye witnesses who saw the act perpetrated. Circumstantial evidence consists of circumstances from which the defendants' guilt may be inferred by the jury.

One cannot say that either of the two types of evidence is more reliable or stronger than the other—An eye witness, for example, may make a mistake in identifying the person whom he saw. His memory may be inaccurate or he may intentionally fabricate a story. Circumstances too many sometimes lead to an irroneous [sic] inference. On the other hand, if the circumstantial evidence is sufficiently strong, it may be even more convincing than direct evidence because circumstances speak for themselves and irresistably lead to a definite conclusion.

To illustrate: If a defendant in a case—this has no bearing on the case at bar; it is just an illustration—if a defendant were charged with breaking and entering into a house through a window and a passerby testifies that he saw someone climb into the house through the window and identifies the defendant as the person whom he saw, this testimony would be direct evidence.

[799] On the other hand, if fingerprints were found on the window sill or sash and they were found to be the defendant's fingerprints, such evidence would be circumstantial evidence. The law permits conviction of a criminal offense on circumstantial evidence alone if the jury is satisfied beyond a reasonable doubt.

Now, in this case, we had experts in several categories testify. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should way [sic] the reason, if any given, for it. You are not bound by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it if in your judgment the reasons given for it are unsound.

Now, I instruct you that no inference of guilt arises against a defendant because of his failure to testify as a witness in his own behalf.

Now, as to the specific charges in this case—and I shall take the second count up with you first for reason which shall later become apparent to you,—as I previously mentioned, the defendants are such indicated in three counts.

[800] The second count is what is commonly known as the felony murder charge. It is a first-degree murder charge. The second count charges that on or about March 13, 1963, within the District of Columbia, Joseph C. Frady and Richard A. Gordon did kill Thomas C. Bennett while perpetrating or attempting to perpetrate the crime of robbery. This second count charges each of the defendants with an offense which is commonly called felony murder. In so far as it is applicable to this case, the District of Columbia Code, Title 22, Section 2410 provides as follows:

"Whoever, being of sound memory and discretion, without purpose so to do, kills another in perpetrating or in attempting to perpetrate any robbery is guilty of murder in the first degree."

Now, the statute means this: If a person kills another in the perpetration of a robbery, or in attempting to perpetrate a robbery, the killing constitutes murder in the first degree.

Under such circumstances it does not make any difference whether the killing was committed with or without purpose so to do. Any killing, even if committed, without any purpose so to do, even if it is accidental, if it is committed in the perpetrating or attempting to perpetrate a robbery, is murder in the first degree.

[801] If two persons, acting together and jointly, are perpetrating a robbery or attempting to perpetrate a robbery and one of them in the course of the robbery and as a part of the robbery, kills another person, then both of the persons involved in the robbery or attempted robbery are guilty of murder in the first degree.

If one person is perpetrating or attempting to perpetrate a robbery and another person aids and abets him

in so doing and the first of these two persons in the course of the robbery and as a part of the robbery, kills a human being, then both the person who aided and abetted him in the robbery and the person who committed the killing are guilty of murder in the first degree.

Under the circumstances of this case, the elements of the offense of murder in the first degree, under the second count, which the Government must establish beyond a reasonable doubt, are as follows:

First, that the defendants were in the District of Columbia jointly perpetrating or attempting to perpetrate a robbery or that one of the defendants was perpetrating or attempting to perpetrate a robbery and the other defendant aided and abetted him in so doing;

Second, that in the course of so doing one of the defendants killed the deceased Thomas C. Bennett;

[802] Third, that the victim Thomas C. Bennett died as a result of a wound or wounds inflicted by one or both of the defendants;

Fourth, that the killing was within the scope of the robbery which the two defendants undertook to commit.

If each of these elements is established beyond a reasonable doubt, then both of the defendants may be found guilty of murder in the first degree under the second count but if anyone, or more of the elements which the Court has outlined to you is not proved by the Government beyond a reasonable doubt, then you must find the defendants not guilty under the second count.

Also I must tell you in connection with the second count that if you should find that the defendants did not form the intent to rob Thomas C. Bennett until after he was dead, then in that event the killing, if it was committed by the defendants or one of them with the other aiding and abetting, would not have been done in pursuance to a robbery or attempted robbery by the defendants and they would not be guilty under the second count.

Further, in this count, as I have used the term "aiding and abetting" a robbery, a little later on, under the Third

count, I will define robbery to you with particularity and you will consider this instruction which I will give you under the third count in considering count two. But I will define aiding and abetting to you at this time:

[802] [sic] The law provides that any person advising inciting or conniving in an offense or aiding and abetting the principal offender, shall be charged as a principal. That is, he is as guilty of the offense as though he himself committed it. If several persons acted jointly or in concert, each performing a part that results in the commission of the offense, all are equally guilty.

It is not essential that any specific time or made [sic] of committing the offense be advised or commanded or that it was done in a way suggested or agreed upon, nor is it necessary that there be any direct communication between the actual perpetrator and the person aiding and abetting.

So, in this case, if you find the Government has proved beyond a reasonable doubt that one of the defendants was perpetrating a robbery or attempting to perpetrate a robbery and the other defendant was aiding and abetting the first defendant in perpetrating a robbery or attempting to perpetrate a robbery and in the cause [sic] of the robbery and as a part of the robbery. Thomas C. Bennett was killed and that the intent to rob, as I shall later explain intent to you under the third count, was present prior to or at the time of the killing, then both of the defendants would be guilty of murder in the first degree under the second count.

However, if you should find that the Government has proved beyond a reasonable doubt that the defendants, or one of them, killed Bennett but that the Government has failed to proved beyond a reasonable doubt that there existed any intent to rob at the time of or prior to the killing, then the defendants would be not guilty under the second count and this would be true even though the defendants, or one of them, conceived the intent to rob the deceased after he was dead.

[803] Now, if you find the defendants guilty of murder in the first degree under the second count, then you will find the defendants not guilty under the first count. In other words, you cannot find the defendants guilty under both Counts one and Count two.

The first count also charges first-degree murder under another section of our code which does not involve a killing while perpetrating or attempting to perpetrate a robbery. If, however, you should find the defendants not guilty under the second count of the indictment, you will then go on to consider whether or not the defendants are guilty under the first count of the indictment—which charges first-degree murder involving premeditation—or under any of the lesser included offenses under the first count which are second-degree murder or manslaughter.

Now, the first count of the indictment reads as follows:

"On or about March 13, 1963, within the District of Columbia, Joseph C. Frady and Richard A. Gordon purposely and with deliberate and premeditated malice murdered Thomas C. Bennett by means of striking him with their fists and with a piece of wood."

[804] Murder in the first degree as charged in the first count, is the killing of a human being purposely and with deliberate and premeditated malice. The essential elements of murder in the first degree as applicable to the first count of this case are:

One, that the defendants in the District of Columbia inflicted a wound or wounds from which the deceased died;

Two, that the defendants had the purpose and the intent to kill the deceased, and;

Three, that the defendants acted with malice, and;

Four, that the defendants acted with premeditation and deliberation.

The first element, that the defendants inflicted a wound or wounds from which the deceased died, needs no explanation.

As to the second element, the purpose, and intent to kill, ordinarily intent canot be proved directly because there is no way of fathoming the operations of the human mind; but intent may be deduced from the circumstances and from the defendants' acts. A person is presumed to intend the natural are [sic] probable consequences of his act. If a man uses upon another an instrument of such a nature and in such a way and under such circumstances that such use would naturally and probably result in death, then you are not compelled to presume that he intended to kill from such acts but have the right to consider them in reaching a determination of his intent.

[805] As to the third element, malice, in its ordinary use in everyday life, the word malice would indicate a feeling of hatred or ill will toward another or a feeling of hastility [sic] towards an individual. In its legal sense, however, malice has a broader significance. It is a state of mind showing a heart, regardless of social duty, a mind deliberately bent on mischief, a generally deproved [sic], wicked and malicious spirit.

Malice, as the law knows it, may also be defined as the condition of mind which prompts a man to do a wrongful act wilfuly [sic], that is, no purpose, to injury of another or to do intentionally a wrongful act towards another without justification or excuse. Malice may be either express or implied. Express malice exists when one unlawfully kills another in pursuance of a wrongful or unlawful purpose without legal excuse. Implied malice is such as may be inferred from the circumstances of the killing, as, for example, where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the act, or when an act imposts [sic] danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.

[806] In determining whether a wrongful act is intentionally done and is therefore done with malice afore-

thought, you should again bear in mind that every man is presumed to intend the natural and probable consequences of his own act. As I have already told you, the intent may be deduced from all the circumstances.

The instrument or means by which a homicide has been accomplished is always to be taken into consideration in determining whether the act is criminal and in what degree it may be so. If in a prosecution for homicide it is shown that the accused used a deadly weapon in the commission of the homicide, the law infers or presumes from the use of such weapon in the absence of explanatory or mitigating circumstances the existence of the malice essential to culpable homicide.

Now, as to the fourth element of the first-degree murder in the first count, that the defendants acted with premeditation and deliberation, premeditation is the formation of the intent or plan to kill, the formation of a positive design to kill. It must have been considered by the defendants.

It is your duty to determine from the facts and circumstances in this case as you find them surrounding the killing whether reflection and consideration amounting to deliberation occurred. If so, even though it be of exceedingly brief duration, that is sufficient, because it is the fact of deliberation rather than the length of time it continued that is important. Although some appreciable period of time must have elapsed during which the degendants deliberated in order for this element to be established, no particular length of time is necessary for deliberation; and it does not require the lapse of days or hours or even of minutes.

[807] If you should find that the Government has proved beyond a reasonable doubt all the essential elements of first degree murder under the first count, namely, the death of the decedent from a wound or wounds inflicted by the defendants, the purpose to kill, malice and premeditation and deliberation, then you may find the defendants guilty as charged.

If you find that the Government has failed to prove all of the elements of first-degree murder under the first count, then you will consider whether the defendants have been proved guilty of the lesser-included offenses of second degree murder or manslaughter.

Second degree murder is the unlawful killing of one person by another with malice aforethought but without premeditation. Murder in the second degree may be committed either with our [sic] without any purpose or intent to kill if the killing is accomplished by malice as I have defined malice to you in detail in connection with first-degree murder. The essential elements which the Government must prove in order for you to find the defendants guilty of second degree murder are:

[808] One, that the defendants in the District of Columbia inflicted a wound or wounds from which the deceased died; that the defendants acted with malice when they wounded the deceased.

So if you find that the Government has failed to prove premeditation and deliberation but has proved the killing of Thomas C. Bennett by Joseph C. Frady and Richard A. Gordon and has proved malice aforethought, then you made [sic] find the defendants guilty of second degree murder.

Malice aforethought means malice as I have defined it to you at the time of the wounding or killing. It does not mean premeditation which is a necessary element of first-degree murder under the first count.

Now, if you should find that the Government has failed to prove malice aforethought, then you will have for consideration whether the defendants have been proved guilty of manslaughter.

Manslaughter is the unlawful killing of a human being without malice aforethought. It occurs when the homicide is committed at the time of mutual combat or when it is commited in passion or hot blood caused by adequate provocation. In otherwords, a homoicide becomes man-

slaughter where the jury finds that there was ample provocation and sudden passion and that both of these things existed at the time the fatal blow was struck.

[809] The element the Government must prove in order for you to find the defendants guilty of manslaughter are:

One, that the defendants inflicted a wound or wounds from which the deceased, died, these being inflicted in the District of Columbia.

Two, that the defendants struck the deceased in sudden passion, without malice, that the defendants' sudden passion was aroused by adequate provocation. When I say sudden passion, I mean to include rage, resentment, anger, terror and fear; so when I use the expression "sudden passion." I include all of these.

Provacation [sic], in order to bring a homicide under the offense of manslaughter, must be adequate, must be such as might naturally induce a reasonable man in anger of the moment to commit the deed. It must be such provocation would have like effect upon the mind of a reasonable or average man causing him to lose his self-control.

In addition to the great provocation, there must be passion and hot blood caused by that provocation. Mere words, however, no matter how insulting, offensive or abusive, are not adequate to induce [sic] a homicide although committed in passion, provoked, as I have explained, from murder to manslaughter.

If you find that the Government has proved all of these elements beyond a reasonable doubt, then you may find the defendants guilty of manslaughter. If, however, you find that the Government has failed to prove anyone or more of these elements, then you cannot find the defendants guilty of manslaughter and you would find them not guilty, assuming you found that the Government hadn't proved either murder in the first degree, murder in the second degree or manslaughter.

[810] Now, with regard to the charge of first-degree murder, and the lesser included offenses which I have

instructed you on under count 1, the aiding and abetting law which I have instructed you on in connection with the second count also applies to count 1.

In other words, if you find that the Government has proved beyond a reasonable doubt that the defendants were guilty, that either of the defendants was guilty of all of the elements of the crime of First-degree murder or of second degree murder or of manslaughter under my instructions and that the other defendant aided and abetted him, the other defendant, in the commission of the murder in the first degree or the second degree or manslaughter, then both defendants would be equally guilty even though only one of the defendants struck the blows which resulted in the death of Thomas C. Bennett,

Now, as to punishment: In the event that you find the defendants guilty of first-degree murder either under count 1 or count 2, it then becomes your duty to deliberate on the punishment which will be imposed. The Statute in the District of Columbia regarding punishment for first-degree murder reads as follows:

[811] "The punisment [sic] of murder in the first-degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment, or, if the jury is unable to agree as to the punishment, it shall inform the Court and the court shall thereupon have jurisdiction to impose and shall impose either a sentence of death by electrocution or life imprisonment."

Under this law, if you return a verdict of guilty of murder in the first degree and do not add any recommendation to your verdict or do not say that you are unable to agree on the penalty, the defendant's sentences must be death.

Similarly if by a unanimous vote you recommend a sentence of life imprisonment, this will be the sentence the defendants would receive. If you are unable to unanimously agree on recommending life imprisonment, then you must so inform the court. It would then become the

duty of the court to impose sentence, either death or life imprisonment.

It is your duty to return a verdict in this case, and I charge you that you should deliberate fully and completely in regard to punishment. You must each reach an individual decision in this regard. This decision in this regard. This decision includes the alternatives, death by electrocution life imprisonment.

This is the law but as the law also requires that your verdict be unanimous, it further provides that when unanimity cannot be reached as to punishment, that is when all your individual views add up to less than a unanimous decision, then only in such event, the duty of fixing sentence falls upon the Court.

[812] In summary, if you find the defendants guilty of first degree murder in either the first or second count, you may return a verdict of guilty as charged which will require the imposition of the death penalty or guilty as charged with recommendation of life imprisonment; and if you are unable to agree or reach a unanimous decision as to either of these, it will then be your duty to so imform the court.

Now, as to the third count, the defendants are charged with robbery in the following language:

That on or about March 13, 1963, within the District of Columbia, Joseph C. Frady and Richard A. Gordon by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear stole and took from the person and from the immediate actual possession of Thomas C. Bennett of the value of about $88.00, consisting of the following: One wallet of the value of 1.00 and $87.00 in money.

Now, what is robbery: A robbery is defined very simple in our code:

"Whoever, by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate

actual possession of another anything of valve [sic], is guilty of robbery."

[813] In order for you to find the defendant guilty of robbery, you must find the Government has proven beyond a reasonable doubt:

One, that the defendants in the District of Columbia took something of valve [sic] from the decedent:

Two, that they took it unlawfully and with intent to convert it to their own purses [sic]:

Three, that they took it from the complainants' person or immediate actual possession;

Four, that they took it by force or violence, against resistance or by sudden or stealthy seizure or snatching or by putting the decedent in fear.

As to the first element, that the defendants took something of value, the value of the thing taken is of no consequence as long as it has some value.

As to the second element, that they took the property unlawfully and with intent to convert it to their own purposes, intent ordinarily cannot be proved directly because there again, there is no way of fathoming and scrutinizing the operation of the human mind, but intent may be deduced from circumstances, from things done and from things said; and a person is presumed to intend the natural and probable consequences of his own act.

[814] As to the third and fourth elements, that they took the wallet and money from the decedent's person or immediate actual possession, normally immediate actual possession means that the thing taken must be on the person or within the reach of the person so long as it is considered to be in such possession that if the victim knew his property was being taken such knowledge would likly [sic] result in physical violence or struggle for possession of the property.

Now, in this case as to both the element of intent as it is involved in robbery and the third element of taking from the immediate actual possession, I instruct you that

if, as a result of a homicide being committed, the perpetrators of the homicide, without having formed the intent before the homicide occurred, take something of value from the body of the deceased immediately after the homicide, this would constitute the offense of robbery in the District of Columbia.

I caution you, however, that while the taking of something of value from the body of a person who is the victim of a homicide by the defendants would constitute sufficient intent to rob under the third count, if the intent to rob was conceived only after the person was dead, that this would not be sufficient intent to rob to meet the requirements of killing another in perpetrating or attempting to perpetrate a robbery under the second count of the indictment.

[815] In other words, if the jury should find that the defendant took something of value from the body of the deceased with the intent to convert the same to their own use but that the intent to take the property was formed only after Bennett was killed, this would be sufficient intent to satisfy the requirement of Count 3 charging robbery but in order to satisfy the requirement of intent to rob in count 2 of the indictment charging felony murder, the intent to rob must have been present prior to or at the time of the killing.

Now, I have previously mentioned the law relative to aiding and abetting in connection with counts 1 and 2, and I instruct you that the same law applies with regard to count 3 and I shall not repeat this phase of the law to you again. If in this case the Government has proved beyond a reasonable doubt as to count 3, all of the elements of robbery, as I have outlined them to you as to one of the defendants and you find that the other defendant aided or abetted the principal robbery offender, then the one so aiding and abetting would be equally guilty of robbery.

Now, if the jury finds that the Government has proved beyond a reasonable doubt that a defendant had exclusive

possession of stolen property shortly after the commission of a robbery, the jury in its diseretion may infer that the possessor is involved in the robbery and the unexplained possession of recently stolen property may itself warrant a verdict of guilty of robbery.

[816] I want to make it clear, however, that the jury does not have to infer guilt from the circumstances of unexplained possession of recently stolen property but they may infer guilt from that circumstance if they see fit to do so and deem it wise under that circumstance and all the other circumstances of the case to do so.

Now, there is testimony in the case that the defendants were seen coming from the premises 1109 Savannah St., Southeast by officers approaching in a patrol wagon and that as the patrol wagon approached, the defendants fled from Savannah St., Southeast, down Savannah St., Southeast to their car parked at 11th Place, Southeast, with one officer in pursuit in the patrol wagon and one officer in pursuit on foot.

If you are satisfied that the defendants did run from the scene of the killing, this in itself becomes a factor which you may take into consideration. Flight or running away does not prove guilt since people have been known to run when there is in fact no immediate need or reason to do so but unexplained flight from the scene of a crime upon the approach of police officers is an element which you have the right to consider, if you wish to consider it, in deciding whether in all the circumstances of the case the act of running away may be evidence of a consciousness of wrongdoing.

Before I close and hand the copy of the verdict form to the jury, does either cousel have anything they wish to suggest to me or object to? If so, approach the bench.

[817] Mr. Collins: No, Your Honor.

At the Bench

Mr. Johnson: Of course I object to the posession of recently stolen—Object on the grounds that I Objected to

it before. I don't think that there is evidence this property is stolen.

The Court: You don't think there is any evidence to support the charge of recently stolen property?

Mr. Johnson: No, sir.

The Court: Any other objections?

Mr. Johnson: No, Sir.

The Court: Nothing you want me to clear up?

Mr. Johnson: No, Sir.

Mr. Collins: Nothing.

The Court: Allright

In Open Court:

The Court: Hand thoes [sic] to the Jury. There are two copies of the verdict for each Juror. Copies of these verdicts have previously been given to (counsel) two or three days ago.

(Two copies of form of verdict handed to each Juror)

The Court: Now, you are directed that your verdict must be the considered judgement of each Juror. In order to return a verdict it is necessary that each juror agree thereto—suppose you don't read these verdicts for a moment. I will take them up with you.

[818] Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgement. Each of you must decide the case for yourself but do so only after a consideration of the evidence with your fellow jurors.

In the course of your deliberation do not hesitate to change an opinion when convinced it is erroneous but do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of the other jurors or for the mear [sic] purpose of reaching a verdict.

Now, if you will refer to the copies of the special verdict which I have handed to you:

They are the same in all details except one applies to one defendant and one applies to the other defendant.

Now let us take up one of these verdicts: You see that I have first put on page one (1) the second count which I suggest that you consider first Although you may consider them in any order that you wish.

Now the second count charges felony Murder. There Are four possible verdicts that you may reach as to the second count. You can, You see, Reach a verdict of not guilty, of guilty as charged to first degree Murder, of guilty as charged to first degree Murder with recommendation of life imprisonment, or four, guilty as charged of first degree Murder with the jury unable to agree as to the punishment.

[819] Now, You will see certain notes underneath this verdict which tell you what the penilties [sic] are in event you return a certain kind of verdict and I wont go over thoes [sic] with you because I think they are perfectly plain.

Now, Whoever is elected Foreman or Forewoman will actually return His copies as the verdict of the jury signed and dated by him and you must return one for each defendent, one verdict for each defendent on each count.

Now, If you reach in the special verdict as to the second count either verdict 1, 2, 3, or 4, the foreman will not write down simply 1, 2, 3, or 4, says, I hope that is perfectly clear. In other words whichever of thoes [sic] four verdicts you reach, You will not just write a number up there where it says "VERDICT" You will write what your actual verdict is, one of these four.

Now, We can go over to the second page which has to do with the first count and you will note the first thing on that page after the number and the title says:

If the jury has found the defendent guilty—and this is the same as to each defendent—guilty as charged in

the second count, that is either the possible verdict 2, 3, or 4 under the second count, then the jury will return a verdict of not guilty under the first count. You will not have to consider all of the six verdicts; You will simply return a verdict of not guilty if you have found the defendent guilty under count 2.

[820] If, However, the jury has found the defendent not guilty under the second count, they will then consider all possible verdicts under the first count, being any one of numbers one (1) through six (6); and you will note that under the first, which is on the second page, that the first four verdicts are the same as thoes [sic] relating to the second count on page one (1) but there are two additional ones: Guilty of murder in the second degree and guilty of manslaughter.

and then below are further instructions, as I have previously given, about the penilities [sic], so they will be perfectly clear to you.

Now, as to the third count, that is on the third page, that is simply one of two verdicts, either guilty, or not guilty as charged of robbery.

Now, again, let me tell you that the foreman or forewoman, who will return their copies as the verdict, will not write out, for example, on the third count "1". They would put "not guilty"; or they would not write out "2", which would mean guilty as charged. You would write out "guilty as charged" if that be your verdict. In other words, don't just put a number down where it says "Verdict"; Put down what the verdict is.

Now, The members of the jury who are not the foreman or forewoman may make a note on their copies of these so that if you should be polled after your verdict is in by either side, you will have a ready refference [sic] to what your verdict is.

Now, as to my further comments to the jury in explanation of the verdict, does either side have any objections or any suggestions to make?

Mr. Collins: No, Your Honor, The Government is satisfied

Mr. Johnson: No, Your Honor.

The Court: and remember that there is one set of three sheets applying to the defendent Gordon and one set of three sheets applying to the defendent [sic] Frady. They both must be returned by the Jury as to all three counts as to the defendent [sic].

Ladies and Gentlemen, at this time I would like to thank the four alternate jurors for their services in this case. We have sat a little more than a week and we have had no casualties among the jury, from illness or otherwise, which is fine: So we have not needed your service, I know you jurors have served long enough to know why we have alternates and how important they are to us, so I shan't explain it to you again. At this time I will thank you for your services, you may be excused to get anything you have in the jury room and then report to the jury lounge for any instructions they may have for you.

[821] (The four alternate jurors were excused and left the court room)

The Court: You other ladies and gentlemen will have to wait because once being instructed, you can't even be in the jury room with an alternate juror.

Of course you ladies and gentlemen know that when you first get to the jury room you will elect a foreman or forewoman to preside over your deliberations and to return your verdict for you. Also, you know should you wish any exhibit or all the exhibits, your foreman merely has to give a note to the marshal to give to me and any exhibit or exhibits which you want will be sent to you. That is assuming they were admitted in evidence.

(There was a short pause)

The Court: I'm sorry to keep you ladies and gentleman waiting but we must clear the jury room.

(There was a further pause)

The Court: Allright, you may retire and consider your verdict.

(Thereupon at 3:45 P.M., the jury retired to consider their verdict.)

DEFENSE COUNSEL'S CLOSING ARGUMENT

[752] Mr. Johnson: May it please the Cout, ladies and gentlemen of the jury, for some time we have been engaged in determining what fact were on March 13, 1963 with an end en [sic] view of determining whether the defendants had committed the crimes as charge in this indictment.

In that endeavor, the Government has brought several witnesses before you.

I am going to try to give you my point of view, the significant value of those witnesses' testimony and the portions of those witnesses' testimony that I think you will have to make up your mind as jorous [sic] as to whether that represents what actually happened, on March 13, that evening, or whether this is an idea or recollection unrelated to what I consider to be the immutable circumstances of this case, which determine truth or falsity of the testimony.

[753] It is very difficult for me to stand before a group of jurors and say that this witness or that witness is not telling the thruth [sic] because I am not an arbiter of whether a man tells the truth or not. I am only engaged in determining whether the testimony that is adduced bears some reasonable relationship to what my view is as a human being in any given circumstance.

Mr. Collons as the start of his argument, made a statement which is undeniably true. He said that when you see rabbit tracks in the snow you know a rabbit has been there, but when you start out with the fact that you know they are rabbit tracks, the conclusion that a rabbit has been there is mighty easy. The difficulty comes when you don't know whether they are rabbit tracks or not and you have got to prove it.

Now, in that proof is where a tale of March 13 lies but, first, I want to direct your attention to what I conceive

to have been inaccuracies on the testimony and to give you my version and the reasons for it.

[754] Mrs. Carrico, first, to give you an idea of what I mean, testified on one occasion that she looked out of her window and saw a car pass by and the man that she recognized, she recognized as being the same as the defendant Frady. No other testimony placed these boys two times on Savannah Street that evening and at first it alarmed me as to how that possibly could happen, because I thought Mrs. Carrico was telling the truth.

Then it accurred to me there was a very valid reason why Mrs. Carrico made that statement. I remembered then that I had to find out when Mr. Weston came by in the same car, passing in the evening after 4:30 in March, whereas, they don't look identical, they have the same general build and visage.

Now, we do know that Mr. Weston didn't leave his work until 4:30 and that he was on his way out in Southeast into the area where Mrs. Carrico lived, just about that time. I believe Mrs. Carrico, not knowing Frady or Mr. Weston by sight or by acquaintance, seeing the same car brought back there that evening and having a white man looking out of the car possibly was confused as to whether this was Frady because we know that he had only passed there on one occasion so far as the remainder of the testimony is concerned, and that is what I mean by calibeating [sic] the evidance [sic] according to what you would reasonably believe to be true.

[755] So I concluded that Mrs. Carrico was telling, to the best of her ability, first, that she recognized the car. We know that.

Second, that the man looked like this defendant here whom she didn't know, so it was reasonable to persume [sic] that a lady sitting back in her apartment in the evening, looking out at a passing car, that she only saw for a second, but which she recognized the outside of the car, would recognize the car, and since the car was back

there that same evening, would think that this was the same man having no way distinguish between the two, never having seen them both but having seen the car twice on the same evening.

So I concluded that Mrs. Carrico's testimony was consistent with good sense and stood that test and had the ring of sincerity that I look for in the testimony of the various witness.

Now, then I came to examine the next witness of any provacative [sic] interest, Officer Hardy, and I had to examine his testimony carefully. He is an officer, he evidently has no interest particularly in this case, and I had to examine him as I would examine an ordinary human being.

First I concluded that he had been trained in police work or else he wouldn't be wearing a uniform, that he had been to a police school, that he had been trained in observation and not only that, that he had experience in testifying Court.

[756] The third thing that I thought about him, that I thought I could not deny, was this was a very serious case as my friend said. This is a first degree murder case. He knew that his testimony was vital to these defendants, that his stightest [sic] word a juror would cedit [sic] under normal circumstances, and that they would give meaning to everything he said. So then I Started examaining [sic] him in the idea of finding out whether despite his—even his attempt not to do so—he would attempt to color his testimony consistant [sic] with the conclusion that he had come to, not whether he is going to tell a lie or not but whether he is going to tend to color his testimony because he's come to a conclusion on the night.

So the first thing that I discovered about Officer Hardy's testimony was that he was inaccurate. Number one, I had to examine it in the light of what a policeman would normally do first and I tested it along that line by examining in this fashion, if you will recall: I said, "Officer Hardy, was it dark that night?" He said, "Yes."

I said, "Now, were there bushes around about?" He said, "Yes"

[757] And there were pictures at this place taken so that I could fine out, since he was coming down Savannah St. from Tweefth [sic] St. on the opposite side of the street from 1109, just approximately how far he had come down before he could see. I got to the place where he saw the boys. He said he saw these boys and he was almost directly in front of 1109, so I knew one thing was true: That he was in the proper position to see the boys. He said they came running down the steps and when they got down in the middle of the steps they said, "Here are the cops," so I knew two things were true from his point of view. That not only he but the boys could see him unaided by the bushes to the side so they weren't looking to the left to see the police and the police weren't coming from the right—I mean they were coming from the right and not from the left, so he had to be almost directly in front of them to see it.

Now, having that in mind that he says he's almost directly in front of it and there are two police officers in that car, and the address is the address that he is responding too a call about, he says he sees these boys running down the steps, not away from him toward him. He remains in the car. The boys come out onto the front porch, turn and go down Eleventh St., and he starts up his car to follow them.

[758] Now, it occured to me that I had to examine that for the purpose of determining whether, in the normal course of police endeavors, a policeman responding to a call of a man screaming would see two boys running directly from the place toward him, would stay in his car, wouldn't drive over toward them to try to cut them off, but would remain in his car and start his car after them, that he would not as much as give notice that he would not as much as give notice that he had any interest in them, although he knew from his testimony that they knew that they had seen him.

Then the next thing I examined about it was this. He said he went around the corner, he last [sic] sight of the boys. Evidently leaving the impression that these boys were fleeing from a scene of a crime and in hot pursuit, he went down to that corner and he turned to the left after they get out of sight and he said then his searchlight got on Frady.

Now, he testified to a peculiar thing. In Government's Exhibit 6A. he testified that these boys cut across this lawn right by those bushes, when he lost sight of them, out into the street and then his light caught up with Gordon and then while the light was on him, that he then stood down behind the car in which he was going to get, knowing the police were immediately behind him, and put a pocketbook or putting something that he couldn't see—in his direct testimony he says he put it under the automobile, and then went around in back of his automobile out of sight and got in the righthand side of the car.

[759] Now, I thought about that for a minute. I thought that was unusual. The next thing I thought about his testimony is this: Well, what did he do then, I said, well, he didn't know what the boys had actually done at that time, he just saw them running. He would probably just make inquiries of them and perhaps that may have been why he didn't do anything about it, although that was hard for me to conceive of, but crediting him with that indescretion [sic] of a police official, I then said, well, now, he's going to search the boys and find out something to hold them with. He searches them.

Now, here's the peculiar part. It became critical to me that Officer Clark then came up to where they were sitting and said that man on 1109 was shot in the head. Now, that testimony occured, and Officer Wesley testified about it, and I asked Officer Hardy, did he remember the conversation, and he said he was talking to my partner and I didn't pay any attention to him. That testimony is to be found in the record—

Mr. Collins: Your Honor, I object to him referring to the record. I think he ought to recall the record, the testimony.

[760] The Court: He may read parts of the testimony, if he wants to, and so can you.

What are you reading from, what volume and what page?

Mr. Johnson: I think that is Volume 3, if Your Honor please.

The Court: Volume three page what?

Mr. Johnson: Page 228, in which this is what his testimony was:

Question. And what was the officer's name that came up to you out there?

Answer. Private Ronald A. Clark.

Question. And during the period he was there, when you had the conversation about the man being shot—you had a conversation about the man being shot?

Answer. He didn't talk to me directly, he was talking to my partner.

So I know at that time, while the boys were on Eleventh Place that he knew that a man had been shot in 1109, or thought that he had been shot, in any event, because the police officer had reported it to him.

Then I said, why certain it is, having just immediately before then seen this boy stoop down and put it under the car in vack [sic] of him, that he would then immediately go there, take his searchlight, and pick it up, so that he could confront him with it. But he did not, it did not happen in that fashion. He said that he stayed there until some other officers came up and then he stayed with them about five or ten minutes more and then he went around on Savannah St., that after he had been around there awhile, he suddenly remembered that this boy had put something under the automobile, and he went back there later on and found it.

[761] Now, when he testified before you ladies and gentlemen of the jury, the first discrepancy occurred—

I didn't believe at that time that that was an accurate portrayal of what happened, but I said, let's test it a minute. I know that he had given sworn testimony at the Coroner's inquiry shortly after this affair occurred. He's testified for you ladies and gentlemen that he also found under that car a pair of gloves.

So then I said to him, I said, "Now Officer Hardy, didn't you testify at the jail that the gloves weren't under the car?" and then I read his testimony at the Coroner's inquest to him and read his testimony here and I said, "Which of these two versions of the sworn testimony is true?" He said, "The one at the Coroner's inquest."

Then it occurred to me that the thing that occurred to him was not that he was attempting, perhaps, to tell a story, but that he was coloring his evidence in his belief that these boys were guilty, and it led him to tell an untruth to this jury.

[762] When I next examined him I wanted to know how long it was before he went back around there, and he told me it was five or ten minutes. His examination a little later on showed that he—he was around there fifteen or twenty minutes and then he went around on Savannah St. and went into the house.

At that time he did not say that he had talked to Mrs. Ryder when she was brought around on Savannah St. after having left the paddy wagon which he later said that he had talked to her in the paddy wagon without getting into it. So I know that it was a substantial period of time later, more than a half hour, when this pocketbook was allegedly discovered.

With that in mind, I had to evaluate exactly that testimony against the testimony of Mrs. Ryder because then I had to find out whether Mrs. Ryder's recount of the thing was true.

She said that, number one, the boys left the car and stayed about five minutes. She, in addition to that, said that she saw the boys walking around the corner

and that after they got in the car she heard the wagon make a noise and looked over her shoulder and saw it pass from her view, then come back into her view up to where they were.

[763] During the course of that I asked her, did anything unusual happen in the meantime before the paddy wagon came by. She says, "Yes, a dark car passed me and went down to the corner and turned to the right". I had a purpose in asking her that.

Then I had to evaluate again—and these are not my witnesses, these are Government witnesses—I had to evaluate the story as to whether the boys were walking around and the paddy wagon came around after they got into the car and this business about stooping down and putting the object under the car was true, there are two different divergent and dimetrically opposed statements in the Government's case as to what happened at that time.

I know one thing, however, I know it would be advantageous to place it the way that Officer Hardy placed it. I know that he is inclined to do that because I can demonstrate that he did it once with reference to the gloves. I can demonstrate that in the record.

Then I started worrying about every single item that occurred and to my eternal surprise, irrefutable evidence that another thing had occurred: I don't suppose you ladies and gentlemen of the jury will ever forget the testimony of the sargeant [sic] who had retired, Sargeant Schevab, who came here and told you, with a background of 27 years, that this was the murder weapon. His honor remonstrated with me because I didn't object immediately. I did but later I affirmatively asked him the question and there was a reason why I asked him. I didn't understand how it was that that weapon could have been used and I will tell you why.

[764] However, before I tell you that, something else occurred. He told you ladies and gentlemen of the jury

that on March 18 that he had taken that piece of evidence down to the District Morgue, placed it on the head of the deceased man to measure whether that had been used to commit the offense.

Now, ladies and gentlemen, that struck me a little peculiar and I will tell you why. I have no way of disputing that, number one. Number two, it would seem to me that in murder, that this occurred, if at all, on March 13th, and I was wondering why it was not until March 18th that some deposition had been made of this particular murder weapon as to determine whether it was or not.

I was horrified, however, when the man from the Federal Bureau of Investigation got on the stand. He testified—and, now, if you remember correctly, he was a bright, intelligent, forthright, honest member of the Federal Bureau of Investigation, and he appeared that way as a witness and immediately when he got on the stand and gave his qualifications, I said, — I conceded the qualifications that he had.

[765] When he testified in this courtroom that that alleged murder weapon had been in his exclusive custody from March 15th to June 7th, I was astaunded [sic]. I was astounded. I said, how could Sergeant Schevab take it down to the morgue on the 18th if this man from the F.B.I. had it from March 15th until June 7th; and then his Honor question about it and he elecited [sic], do you have your notes here, and he says, yes. He says, "As a matter of fact, my notes show I was exactly working on it on the 17th and the 18th. I was working on it myself, and it never got out of my custody."

Why, then, I commenced wondering, why this discrepancy. This—it doesn't mean anything. He could have said he took it there on the 14th or the 13th, but I wonder why he testified that way and I am going to tell you what happened, and this is a disastrous type of thing in a murder case, a desastrous [sic] sort of thing.

Before they sent that thing down to the Federal Bureau of Investigation to test it for blood of this decedent and to test it for a hair that they said they had on it, this police official must have taken it down to the Morgue and stuck it in the wound. There is no other conclusion that you can come to. They made a patsy out that man on the stand. They brought him in here and if you ladies and gentlemen remember that I said, was that piece of hair on the side or was it on the bottom, and they said, no, it was on the side. I said, "Did it look like it was just laying on there?" He says, Yes.

[766] Well, now, why would you do that? Why? I don't have a chance, if those are just—it just happens that the Federal Bureau of Investigation keeps records. It just happens.

Now, can I then say with confidence that I believe that type of testimony? How can I say it? Isn't it ridiculous to do that to someone? Is there any safety in this type of thing? Is it necessary to bludgeon these boys down like that? Why would you do that? It just seems inexcusable.

Now, everything else, I worry about. What am I going to have these boys, deny it? What can you do? What can you do? What relief have you got? Is there any possible thing you can do to combat it? But here is a demonstration, this one little thing, just one little thing, one hair and not to tell the Federal Bureau of Investigation that they did that and come and tell you that they sent it to the Federal Bureau of Investigation on the 15th for examination and they did that afterwards on the 18th is ridiculous and inexcusable.

[767] Now, it would be a matter, a different matter, I imagine, if it were a game of tiddlywinks, but two boys' lives depend on this, two boys lifes [sic] depend on this and I think it is absolutely inforgivable for anybody in an official capacity to do a thing like that.

The only other conclusion you can come to is that the man with the Federal Bureau of Investigation is an

unmitigated liar. That is the only way you conclude that that happened.

Now, that caused me some concern about the pocketbook because that gave me some concern. However, let's proceed a little further and let's, aside from intuperation [sic] and—pardon my excess in that regard—let's examine this from a point of view from just a common sense point of view. This indictment charges that on March 13 these boys were with premeditation and malice aforethought went up to that place to kill this man with their fists and a piece of wood. They absolutely premeditated going there to do that. That is the first thing.

Now, let's assume, again, let's examine that and see whether that fits.

[768] Now, there could be two circumstances. There is no proof that they knew Thomas Bennett, no proof of that, so we don't have that to work on, but there are two conclusions we can come to. They either didn't know him or they did know him. There are only two ways to look at it, and I don't think there is any error in looking at it in both ways.

Now let's proceed on the theory that they didn't know him. Would you suppose that two men would, with premeditated and with malice aforethought, go up to a stranger's house, barehanded, knock on the door, to murder him and what kind of man? Well, we don't know what he is but that doesn't quite cotton the man. If they were going, up there and had said we are going, make up our mind we are going to murder this man in this house, there's not been one suggestion that they even knew his name.

However, let's examine it a little further. Let's take the other end of the thing that they did knew [sic] him, it isn't any better on the end. Would two boys there go up there to murder a man barehanded who was six feet tall, weighed 195 pounds and was well developed physically and if they did so, would they go then and politely knock on the door for him to come so they could start

the murder? In other words, that is what Mr. Collins just finished saying, then went in and then they maneuvered around this man to stalk him and to kill him with their barehands, and and [sic] what does he say they killed him with? Their bare hands and a piece of wood. That was from a table, that was already in there. So we must presume, then, that the boys are going there, according to the first count, and murder this man with a piece of wood that they are going to find in the house, that we don't know that they have ever been in there before.

[769] Now, it seems to me that something else must have happened but that. Now, let's examine the second count in that area. It's a matter of common sense, did they go up there to rob him? Well, I don't know how robberies accur [sic]. I don't suppose there is any limit as to the way it can be accomplished, but one of the least recommended ways would be to go up there bare handed to rob a man either that you didn't know who he was, or if you knew who he was, you knew he was a great big man, and knock on his door and then proceed to rob him. It seems to me that—of course, unless there is some compelling reason to make them do this, it would be highly improbable that they would do that.

Now, let's examine it a little further from the point of view of common sense and the way people ordinarily think, and the way I think this evidence shows.

Frady, under the evidence, according to the evidence, didn't know Mrs. Ryder prior to the night. He didn't know who she was. Now, do you suppose, then, he would premeditate, commit murder and commit a robbery with a brand new young lady that he didn't know in the car waiting for him? I don't understand. Maybe they are totally ignorant, with no sense whatsoever, but I suppose they know left from right. I don't suppose anybody in the world ever committed a robbery and a murder in this fashion in my life.

[770] Now, that made me suspicious of this thing and they've got me down to one further fact. That fact, I

think, is absolutely immutable. I don't suppose Mrs. Hunt would tell a lie on the stand for love or money for me or anybody else. I don't suppose she would. Mrs. Hunt says—and the police say that she called the police—when she heard this man screaming. I know that happened. The police records show that she called exactly at 8:44, Mr. Collin's developed the fact. I didn't develop it. He asked how long before she called was it that the knock occurred. She said about ten minutes.

Then he went—he didn't stop, he said, Well now, what happened after the call. She says nothing happened for a couple of minutes. "Then I heard some rumbling in there. Then there came a thumping like something—somebody was fighting and being knocked all around and finally started screaming and then I decided to call the police."

[771] So we know, or as nearly as we can tell, and as honest as I think that lady is, that they—persons came up on that step at approximately 8:34, approximately, give or take a couple of minutes. They had to. Then the fight went on for ten minutes until the screaming started, after which she called, which is 8:44.

Now, those are the police records because I have introduced no evidence about that. They testify that is what happened, and Mrs. Hunt, testified for the Government that that was the time element.

Then I have to go back to Basson's restaurant and young Ryder got on the stand and testified that he called his wife or his wife called him at 8:05, and I didn't ask him why he would remember that time, but I thought you, as ladies and gentlemen of the Jury, would know how he'd remember that time. I think he was concerned because his wife wasn't home, and I think their conversation was "Why aren't you home and where are you." He's a young man, married to a young woman, and I think that is what the conversation was about, I am almost positive of it. So I think that she told him, just like

she said that "I'll be home in about three-quarters of an hour."

Then I started to thinking about Mrs. Ryder's testimony. Her husband is evidently concerned about her being where she is, starts to become time conscious," when am I going to get home" so then I asked her approximately what time did she leave, and she said "I think it was about 8:32."

[772] Now, I said maybe that's a guess and maybe a helpful thing for me but then, lo, and behold! the Government produced the waitress from the place and she said, she gave an estimate, the best she could, between 8:30 and 9:00, and I looked at the clock at 8:30 and they were gone.

Now, let's examine that. Let's don't swallow it like a pill. Let's examine it under the way we would examine time as a matter of common sense. Let's add eight minutes to the 8:05. That's 8:10. There's no question but that Gordon must have eaten a chicken dinner in there. If it wasn't, the United States Attorney's office would have known about it because time is becoming awful important in this thing. He says, "I ate my chicken dinner, and then this conversation that he brought out took place, Frady getting up from the table. Gordon getting up from the table, and I imagine that I can give the man eight minutes to eat a chicken dinner, just eight minutes if it's already ready right there, eight minutes, that 8:18. Suppose they didn't talk but two minutes and drank their beer in two minutes more. That's 8:20. They couldn't have gotten to 1109 Savannah St. until the screaming started. Now, that is where the crux of this case is.

[773] Now, those are not my time elements. These are the Government's time elements. They produced these witnesses. I didn't produce them.

Now let's examine it a little further, see whether that is consistent with things. Suppose these boys went there and they heard the man screaming. They more than likely could. Would they run away? Would they walk down the

street and get out of the way? I think they would. I am not saying—don't get the idea that I am saying it happened one way or the other—I just want you to eximine [sic] it from a common sense point of view.

Now, what do you think happened in their mind when a policeman came up there and said the man around the corner is shot in the head? What do you think happened to their minds at that time? Now, I want to tell you this. I would have never been able to have proved that by a single, solitory [sic] witness except these defendants or somebody else closely connected with them. Nobody that I know of would have witnessed it. They know nobody but the Government produced these witnesses and I think that when you look for consistencies—His Honor is going to instruct you along those lines—about what you are to look for, how much proof you have to have, whether you can rationalize the conduct in this case without convicating [sic] these boys, and it's precisely just about that, and that is what your duty is, if you can do it. In other word, that is consistant [sic], that there is consistency with anything, it is going to be your duty to acquit him. Mind you, my friend—I don't have to depend on Atkins. I don't know him. They don't know him. He is a man that called up and gave some information. However, his testimony, let's see, again, is corroborated.

[774] Number one, if the time element is correct that the Government produced, then the beating started before the boys got there, then somebody beat him, somebody beat him. Now, the testimony is by that man that immediately after he saw the boys walking down the street, he saw this man come out, come across the street, get in his car and go away after the paddy wagon went around the corner. Now, that is his testimony.

Now, it would be—maybe you might be inclined to disbelieve, don't pay any attention to his testimony, but let's see if the opportunity existed by unimpeachable evidence for that to have occurred. I don't think Mr. Carrico is

going to lie, either, but when Mr. Carrico got on that stand and told me that he left that area about 8:30, that he went to get some gasoline and groceries and he came back to that area, when the K-9 dog man came in and at that time there were no other police officers in the thing, then I knew that after the paddy wagon went around the corner there was an interim when there was nobody to watch that man but Atkins. I knew it then. I don't think that could have been trumped up with Corrico [sic]. I don't think that. I think when I showed that this man's testimony is not palpably untrue and it is consistent with the time element, absolutely consistent with the time element, absolutely consistant [sic] with the movements of the parties as we know them and all of it from Government testimony, I don't think that you can say—I don't think that you can say "I just don't believe that," because it follows the rule of consistency with the known factors that are immutable and you can't change.

[775] In addition to that, I might tell you this: In this case, as in every other case, your duty is to find the facts impartially without favor and it is your duy to find them according to a way which makes the evidence consistent if it can be made with these boys innocence not with their guilt. If there is a way for you to lok [sic] at this evedence that is consistent with their innocence, it is your duty to follow that and His Honor will tell you that.

The Court: No, I will not. I denied that instruction, Mr. Johnson.

Mr. Johnson: Yes, sir.

It is my understanding, their, that it is your duty to find, if you can find in this evidence as you know it to be, that is consistent with their innocence, and I think if you find it that way you have a duty as a juror to follow it that way. I don't think—and you are the final arbiters of the facts. Not anyone else on earth can tell you what the facts are. No one, me, Mr. Collins, or His Honor, none of us can tell you what the facts are. You are in a superior position to anyone else in the world

about the facts in this case. You don't have to believe what I say about them. You don't have to believe what Mr. Collins says, His Honor, or anyone. You have actual, free, clear facts to find that the evidence, as you in your conscience can find it, as it is in this case, and only on the evidence, only on the evidence adduced.

[776] The Court: Mr. Johnson, you have used 45 minutes.

Mr. Johnson: Yes, sir, very well, sir.

The Court: You have fifteen more.

Mr. Johnson: Yes, sir.

Now, with regard to one other factor, and I will have done.

There is one single witness in this case that hasn't been produced by the Government. That is the K-9 dog man. There was a witness here who, the last witness on, attempted to dispute the fact that there was an opportunity for that man to come out of that house and get in that car and go away. Perhaps the only other man that I know of could have given any testimony was the K-9 dog man, and he is not here and he hasn't testified. That is the only man in the world that I know of that could have done so, and he wasn't produced.

[777] Now, finally, may I say this to you: I don't believe that it is reasonable to assume that these boys, with no weapons, one of them with a strange girl he had never seen before, went to 1109 Savannah St. with premeditation and malice aforethought to kill Thomas Bennett, nor do I believe that they ever intended to rob him; and, finally, and in that connection, it is your duty as jurors to take those facts that I have just indicated to you and your experience as men and women in this community and determine, because you have to find, you have to find that they intended to kill him with some instrument or something at some time or the other. You have to find that in order to convict them under the second count that they went there for the purpose of robbing him and killed

him incidentally to a robbery. You have to find those facts which are hard to find under the circumstances in this case.

I say to you that your duty is the highest duty that an American Citizen can perform. I hope and trust that you perform it with the integrity I know you will, and I know and I trust and hope that when you rationalize this thing without being influenced one way or the other by passion, prejudice or anything else and view this evidence in the light of common sense and in the light of the facts that this evidence comes from the Government, and he vouches for it, that these boys are not guilty of the offenses with which they are charged.

SUPREME COURT OF THE UNITED STATES

No. 80-1595

UNITED STATES, PETITIONER

v.

JOSEPH C. FRADY

ORDER ALLOWING CERTIORARI

Filed June 29, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

The Chief Justice and Justice Marshall took no part in the consideration or decision of this petition.

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SUPREME COURT, U.S.

No. 80-1595

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES OF AMERICA, Petitioner

v.

JOSEPH C. FRADY, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 80-1595

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES OF AMERICA, Petitioner

v.

JOSEPH C. FRADY, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Joseph C. Frady, moves the Court for leave to proceed in forma pauperis. Respondent proceeded in forma pauperis in the courts below. Counsel for Respondent was appointed to represent him under the Criminal Justice Act, 18 U.S.C. §3600A.

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No. 80-1595

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES OF AMERICA, Petitioner

v.

JOSEPH C. FRADY, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

In this case the Court of Appeals reversed a first degree murder conviction on collateral attack after finding the trial court had given jury instructions on malice unconstitutional under retroactive holdings of this Court. On direct appeal, one judge had held the evidence insufficient to prove premeditation. Frady v. United States, 348 F.2d 84, 95 (D.C. Cir., Wright, J., dissenting.) On collateral attack, the Court of Appeals held the instruction errors required reversal because of the prejudice to Mr. Frady--the evidence of malice, like the evidence of premeditation, was subject to question and Mr. Frady, therefore, had been deprived of a proper jury determination of his culpability.

The government concedes the error in the jury instructions, but claims Mr. Frady's failure to raise the error on direct appeal

should bar habeas relief absent demonstration of "cause" for his procedural default. The government believes the contrary decision of the Court of Appeals ignored the distinction between direct appeal and collateral attack.

REASONS TO DENY THE WRIT

Before discussing the authorities sustaining the Court of Appeals decision, we make three preliminary points.

First, the government's analysis confuses two questions: (1) whether failure to raise the claim on direct appeal bars consideration on habeas, and (2) whether the "cause" requirement of Rule 12, Federal Rules of Criminal Procedure, applies generally to all habeas actions by federal prisoners--even though Rule 12 by its terms does not apply to jury instruction errors, and the Rule 52 "plain error" standard does, as the government concedes[1/] and the Court of Appeals held.

Second, as we show below, the government's erroneous belief the Court of Appeals confused direct appeal and collateral attack stems from the government's failure to discuss authorities addressing the first question above. These cases reveal the distinction clearly, as well as resolve this first question in Respondent's favor.

Third, the government neglects another important point. This case is not a typical federal proceeding under 28 U.S.C. §2255. This is a local, D.C. homicide. It is in federal court solely because it dates from a bygone era in which the U.S. District Court for the District of Columbia tried all local D.C. felonies, and the U.S. Court of Appeals for the District of

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1/ Petition at 13, n.11.

Columbia was, anomalously, the court of last resort on questions of purely local law. In cases such as that here, the federal courts in the D.C. Circuit apply federal procedural rules while determining questions of substantive D.C. law.

Whether Mr. Frady was sufficiently prejudiced by the erroneous jury instructions is a question of substantive law resolved by the Court of Appeals as a remnant of its former plenary authority to decide local issues. The Court of Appeals holding on the question of prejudice is not properly before this Court and deserves the same deference accorded the judgment of the highest court of a state on a question of state law.

We turn to the federal procedural issues raised by the government's petition.

I

Respondent's failure to challenge the unconstitutional jury instructions on direct appeal presents no new question. United States v. Tucker, 404 U.S. 443 (1972), and Kaufman v. United States, 394 U.S. 217 (1968), both undiscussed in the government's petition, control.

Tucker and Kaufman applied two exceptions to Sunal v. Large, 332 U.S. 174 (1947). Sunal held a federal prisoner's failure to raise an issue on direct review precluded collateral attack "where the error does not trench on any constitutional rights" and the case "is not one where the law was changed after the time for appeal had expired." Sunal, supra at 182, 181.

Kaufman applied the first exception, the Court holding, at 223, "that federal habeas relief for constitutional claims asserted by federal prisoners is not limited by" the Sunal rule. (Emphasis in original.) The vitality of this exception is beyond

question. United States v. Addonizio, 442 U.S. 178, 185 (1979); Davis v. United States, 417 U.S. 333, 354 n. 15 (1974).

The second exception was applied in Tucker. There the Court held a federal prisoner could collaterally attack his sentence, imposed in 1953, since the sentencing court had considered state court convictions invalid under Gideon v. Wainwright, 372 U.S. 335 (1963). Tucker's failure to raise the issue on direct appeal was of no consequence, since at the time for that appeal Gideon had not been decided. The Tucker Court held habeas relief warranted, as Gideon was fully retroactive and the error was "of constitutional magnitude." Tucker, supra, at 447.

The Sunal exception applied in Tucker was also recognized in Kaufman, the Court noting that habeas relief is available for constitutional errors not challenged on direct appeal "if new law has been made . . . since the trial and appeal." Kaufman, supra, at 230. This point was again recognized in Davis, supra at 342.

Both of the Sunal exceptions apply here. The challenged jury instructions, first held plain error in cases decided several years after Mr. Frady's direct appeal, were of the kind deemed unconstitutional in Mullaney v. Wilbur, 421 U.S. 684 (1975). Mullaney was held retroactive in Hankerson v. North Carolina, 432 U.S. 233 (1977). In these circumstances, Mr. Frady's failure to challenge the unconstitutional jury instructions on direct appeal is no bar to habeas relief. Furthermore, Kaufman and Tucker reveal that once a claim falls within a Sunal exception, and failure to raise the claim on direct appeal was not a tactical ploy, no additional special restrictions, other than applicable rules of procedure, hamper consideration of the case on its merits.

II

The government, however, urges a change in the law and, by

spurious analogy to Davis v. United States, 411 U.S. 233 (1973), asks the Court to hold Respondent required to show "cause" for his failure to raise the constitutional error on direct appeal.

Such a change in the law, however, would defy logic. The Davis "cause" requirement comes from the express language of Rule 12, Federal Rules of Criminal Procedure. Rule 12 governed the indictment challenge raised in Davis, but the rule by its terms has no applicability to the instruction errors here, which on direct appeal are governed by the Rule 52 "plain error" standard. Davis applied the Rule 12 "cause" requirement since Rule 12 applies to direct appeals and failure to enforce it on collateral attack would have established a standard of review actually lower than that on direct appeal. The Davis reasoning does not impose the "cause" requirement here since the direct appeal standard is "plain error."

Nonetheless, the government argues the Davis "cause" standard should be extended to cover this case. The government claims Francis v. Henderson, 425 U.S. 536 (1976) and Wainwright v. Sykes, 433 U.S. 72 (1977), which involved neither federal prisoners nor federal rules, support this result.

In Francis a state prisoner belatedly raised a habeas claim identical to that of the federal prisoner in Davis. The state had an absolute waiver provision, more strict than federal Rule 12's "cause" requirement, and a state court had held the claim for collateral relief barred by the strict state rule. This Court held the state rule required greater deference than the "deliberate by-pass" standard of Fay v. Noia, 372 U.S. 391 (1963). As a matter of federal comity, the Court adopted the "cause" standard. The Court expressly held a different result would obtain if the state court had declined to find a waiver and had reached the

merits of the claim. Francis, supra at 542 n.5. The "cause" standard was also applied in Wainwright v. Sykes, 433 U.S. 72 (1977), where again the state had an absolute waiver rule strictly enforced by state authorities.

Davis, Francis, and Sykes established that on collateral attack the standard of review must consider the federal or state rules applicable to direct appeals. Federal prisoners must meet the standards of federal rules, state prisoners must meet the standards of state rules, but if state procedural rules absolutely bar the claim, federal habeas relief may be granted upon demonstration of "cause" for not complying with the state rule.[2/]

Under the federal rules, "plain error" is the standard applicable to direct review of instructions not challenged at trial. Following Davis, the Court of Appeals applied this standard to Mr. Frady's collateral attack. This approach was also taken in Tallman v. United States, 465 F.2d 282 (7th Cir. 1972). The government cites no case applying the "cause" standard to a federal prisoner's habeas claim not governed by Rule 12. There is no division among the circuits on this question and the result reached by the Court of Appeals in this case is amply supported by Sunal, Kaufman, Tucker and Addonizio.

This result does not obliterate the distinction between direct appeal and collateral attack, as the government argues. Sunal established a major barrier to collateral claims not raised on direct appeal. The Sunal exceptions applicable here allow collateral relief for constitutional errors prejudicing jury deliberations on the fundamental question of guilt or innocence. It is precisely such errors which the great writ of habeas corpus was intended to correct.

2/ The significance of procedural rules in this context was also noted in Hankerson, supra at 244, n.8, where the Court held the states, "if they wish," may invoke state procedural rules to limit or bar consideration of habeas claims relying on Mullaney.

CONCLUSION

The petition for certiorari should be denied.

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FILED
SEP 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1595

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the "plain error" standard of Fed. R. Crim. P. 52(b) governs the availability of collateral relief from a criminal conviction that is challenged on the basis of erroneous jury instructions to which no objection was made at trial or on direct appeal.

2. Whether, assuming "cause" must be shown to excuse a defendant collaterally attacking his conviction from the consequences of his failure to make timely objection, that standard is satisfied by the conclusion that objection may have been thought futile.

3. Whether respondent suffered actual prejudice as a result of the erroneous jury instructions sufficient to warrant setting aside his conviction on collateral attack.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1595

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-18a) is reported at 636 F.2d 506. The order of the district court (Pet. App. 29a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on August 4, 1980. A petition for rehearing with a suggestion for rehearing en banc was denied on October 22, 1980 (Pet. App. 21a-28a). On January 13, 1981, the Chief Justice extended the time in which to petition for a writ of certiorari to and including February 19, 1981. On February 11, 1981, Justice Bren-

nan further extended the time in which to petition for a writ of certiorari to and including March 21, 1981. The petition was filed on March 20, 1981, and was granted on June 29, 1981 (J.A. 59). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

1. 28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

2. Rule 30 of the Federal Rules of Criminal Procedure provides in pertinent part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection * * *.

3. Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

1. On March 13, 1963, respondent and Richard Gordon murdered Thomas Bennett in his home. Bennett's "head had been caved in by several blows from a blunt instrument and a mixture of blood and brains was coming from the wounds. ** * One of the victim's eyes had

been knocked from its socket and was lying on his cheek when the officers arrived." *Frady* v. *United States*, 348 F.2d 84, 100 (D.C. Cir.) (en banc) (*Frady I*), cert. denied, 382 U.S. 909 (1965). See Tr. 121, 168, 189, 359-365. Respondent and Gordon battered and stomped their victim to death. One of the murder weapons appears to have been a broken piece of a table top. See Tr. 198-199, 368-369, 386. There were horseshoe-shaped marks on the victim's neck and chest that corresponded in size and shape with the metal heel plates on respondent's leather boots (Tr. 202, 259-260, 363-364, 369-370); dried blood was found around the heel of respondent's right boot and in numerous other places on both of his boots (Tr. 65-66, 202, 297-298, 301).

Hearing the victim's screams for help during the struggle, which lasted for approximately ten minutes, a neighbor called the police. See Tr. b-57 to b-59. Two officers arrived as respondent and Gordon emerged from the doorway of Bennett's house. Tr. 54-57, 109-112. One of the officers heard one of them say "the cops" as they came out of the door and ran down the street to a car that was waiting with its motor running. Tr. 58, 62, 86, 113-115. As they ran, Gordon discarded the victim's wallet and a pair of gloves. Tr. 59, 68, 225-226.[1] When the defendants were arrested almost immediately thereafter, both were covered with blood. Tr. 65-66, 124-125.

Investigation revealed that respondent had driven past his victim's house two separate times on the day of the murder. From this and other evidence at trial, "the jury could have concluded that Frady and Gordon twice reconnoitered so they would know Bennett's house when they returned later in the evening after darkness had completely fallen" (*Frady I*, *supra*, 348 F.2d at 102). Immediately before the murder, respondent and Gordon

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[1] Gordon had picked up the gloves just before entering Bennett's house. See Tr. a-100. "Significantly, the murder weapon bore no fingerprints" (*Frady I*, *supra*, 348 F.2d at 101 n.3).

met with the victim's brother, George Bennett, who told them that "he needed time to get the furniture and things settled" (Tr. a-72, a-86). During the course of their conversation, respondent asked the victim's brother if a man could be killed by hitting him in the chest: "could you break a rib and fracture or puncture a lung, could it kill a person" (Tr. a-86). As respondent and Gordon prepared to leave, George Bennett promised them a "bonus" if they did a "good job" (Tr. a-92). "[T]he jury could well have concluded that Frady and Gordon were assassins hired by George Bennett to do away with his brother in order to get his furniture and other possessions" (*Frady I*, *supra*, 348 F.2d at 103).

At trial, the defense was a complete denial of responsibility. Respondent's attorney attacked the credibility of the prosecution witnesses and the plausibility of the prosecution's theory of the case, suggesting that another man, the real murderer, had been seen leaving the house of the victim. The question of intent was not in issue; the evidence contained no hint of self-defense or any other defense affecting the degree of culpability. Neither respondent nor Gordon testified.

The elements of first-degree murder in the District of Columbia, as pertinent here, require that the killing be done "purposely * * * of deliberate and premeditated malice" (D.C. Code Ann. § 22-2401 (1961)). A finding of malice alone, without deliberation and premeditation, can support a conviction only for second-degree murder (D.C. Code Ann. § 22-2403 (1961)). Absent malice, a culpable homicide is classified as manslaughter. During a lengthy charge to the jury, the trial court explained (J.A. 27-28; emphasis added):

> [I]n its ordinary use in everyday life, the word malice would indicate a feeling of hatred or ill will toward another or a feeling of hastility [sic] towards [sic] an individual. In its legal sense, however, malice has a broader significance. It is a state of mind showing a heart, regardless of social duty, a

mind deliberately bent on mischief, a generally depraved, wicked and malicious spirit.

Malice, as the law knows it, may also be defined as the condition of mind which prompts a man to do a wrongful act wilfully, that is on purpose, to injury of another or to do intentionally a wrongful act toward another without justification or excuse. Malice may be either express or implied. Express malice exists when one unlawfully kills another in pursuance of a wrongful or unlawful purpose without legal excuse. Implied malice is such as may be inferred from the circumstances of the killing, as, for example, where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the act, or when an act imposts [sic] danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.

In determining *whether a wrongful act is intentionally done and is therefore done with malice aforethought*, you should again bear in mind that every man is presumed to intend the natural and probable consequences of his own act. As I have already told you, the intent may be deduced from all the circumstances.[2]

The instrument or means by which a homicide has been accomplished is always to be taken into consideration in determining whether the act is criminal and in what degree it may be so. If in a prosecution for homicide it is shown that the accused used a deadly weapon in the commission of the homicide, *the law infers or presumes from the*

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[2] While defining the elements of first-degree murder, the court had already told the jury (J.A. 27; emphasis added):

> If a man uses upon another an instrument of such a nature and in such a way and under such circumstances that such use would naturally and probably result in death, *then you are not compelled to presume that he intended to kill from such acts but have the right to consider them in reaching a determination of his intent.*

use of such weapon in the absence of explanatory or mitigating circumstances the existence of the malice essential to culpable homicide.[3]

No objection was made to these instructions by the defense. The jury found both defendants guilty of first-degree premeditated and deliberate murder and of robbery, but, in accordance with the trial court's instructions that the defendants could not be convicted of both premeditated murder and felony murder, the jury returned verdicts of not guilty on the felony-murder count.[4]

2. On direct appeal, the court of appeals, sitting en banc, affirmed respondent's conviction for first-degree murder, specifically rejecting his claim that the evidence of premeditation and deliberation had been insufficient. *Frady I, supra,* 348 F.2d at 85-86, 99-103.[5] Two years

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[3] The italicized portions of the instructions in the text were the basis for the decision of the court of appeals in this case. The court of appeals expressly declined to decide whether this Court's decision in *Sandstrom* v. *Montana,* 442 U.S. 510 (1979), was applicable in this case (Pet. App. 5a-6a n.7). Compare *Burton* v. *Bergman,* No. 80-1497 (6th Cir. May 21, 1981) slip op. 5 n.3, with *United States* v. *Spiegel,* 604 F.2d 961, 969 n.15 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980).

[4] One week after the verdict, respondent and his co-defendant filed a motion for new trial, specifying 24 alleged errors, among them "failing to instruct the jury as requested" (R. 27). Four instructions prepared by defense counsel, dealing with reasonable doubt and circumstantial evidence, had been requested but denied (R. 22). The instructions complained of in this case, however, were not mentioned. ("R." refers to the record in the court of appeals.)

[5] The court also affirmed respondent's robbery conviction. For reasons that are immaterial in this case, the court vacated the sentence of death that had been imposed on the murder conviction and remanded the case, directing the trial court to resentence respondent to life imprisonment, "the only sentence other than death that [could] be imposed" under the statute as it existed then. *Frady I, supra,* 348 F.2d at 85. In accordance with the instructions of the court of appeals, the trial court resentenced

later, the court of appeals stated in another case that it was error to instruct a jury that "the law infers * * * malice" from the use of a deadly weapon and that a correct statement would be that the law permits the jury to infer malice. *Belton* v. *United States*, 382 F.2d 150, 154 (D.C. Cir. 1967); see also *Howard* v. *United States*, 389 F.2d 287, 291 (D.C. Cir. 1967).[6] In *Belton*, the court declined to find "plain error," however, and affirmed the conviction for first-degree murder, saying: "A jury inferring premeditation and deliberation could hardly have failed to infer malice" (382 F.2d at 155).[7] The following year the court of appeals noted that "[a] wrongful act intentionally done is not therefore done with malice" (*Green* v. *United States* (*Green I*), 405 F.2d 1368, 1370 (D.C. Cir. 1968)) and accordingly held that it was error to equate the two concepts in jury instructions by using the phrase "whether a wrongful act is intentionally done and, therefore, is done with malice" (*ibid.*). See *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970); *Sims* v. *United States*, 405 F.2d 1381, 1384 n.5 (D.C. Cir. 1968). As in *Belton*, the court attributed the trial court's misstate-

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respondent to life imprisonment on the murder conviction. The district court also expressly stated that the sentence on the robbery conviction, which would have become academic had the death sentence been carried out, was to be consecutive to the sentence of life imprisonment.

The defects in the instructions complained of in this case were not raised in respondent's unsuccessful petition for a writ of certiorari.

[6] In *Belton* the court attributed the trial court's misstatement to inadvertence, stating:

> We have little doubt that if objection had been made this slip of the tongue by a capable trial judge—assuming the reporter heard him right—would have been corrected.

382 F.2d at 154.

[7] In *Howard* the court also declined to find "plain error" requiring reversal. 389 F.2d at 291.

ment to "inadverten[ce]" (*Green I*, *supra*, 405 F.2d at 1370) rather than to any lack of clarity in the law.[8]

3. Beginning in 1965 respondent filed at least six meritless motions seeking to have his sentence reduced, modified, or vacated (including one alleging ineffective assistance of counsel). In 1978 he moved to vacate his sentence on the robbery conviction because the murder and robbery arose out of the same transaction (Pet. App. 2a-3a n.2). The motion was denied, and the court of appeals denied leave to appeal in forma pauperis, concluding that there was no merit in the claim. *United States* v. *Frady*, 607 F.2d 383, 385 (D.C. Cir. 1979) (*Frady II*). In a motion for reconsideration filed in the court of appeals, respondent modified his claim, arguing that the consecutive sentence on the robbery conviction violated the Double Jeopardy Clause. See note 5, *supra*. Since the robbery sentence was originally "concurrent with the sentence of death for the murder" (607 F.2d at 386), respondent had already begun to serve the sentence when the court of appeals vacated the death sentence and remanded for resentencing (*id.* at 386-387). Therefore, the court of appeals concluded, "alteration" of the robbery sentence by making it consecutive to the sentence for murder violated the Fifth Amendment. The court of appeals directed the district court to enter an order making the robbery sentence concurrent with the life sentence on the murder conviction. 607 F.2d at 387.

4. Three months after the decision in *Frady II* was announced and 16 years after his trial, respondent again collaterally attacked his murder conviction pursuant to 28 U.S.C. 2255. For the first time (see Pet. App. 3a n.3), respondent claimed that the erroneous jury instructions on malice given at his trial warranted vacating his murder conviction. The district court denied the motion on the ground that respondent either had or

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[8] None of these decisions purported to rest on constitutional grounds or to overrule any prior decision.

"could have" raised these claims on direct appeal from his 1963 conviction or in one of his previous motions for relief under 28 U.S.C. 2255 (Pet. App. 29a). The court of appeals reversed (Pet. App. 1a-18a).

Relying on *Davis* v. *United States*, 411 U.S. 233 (1973), the court of appeals reasoned that since "plain error" (Fed. R. Crim. P. 52(b)) in jury instructions could be noticed on direct appeal notwithstanding a failure to object at trial as required by Fed. R. Crim. P. 30, "plain error" could also be noticed on collateral attack (Pet. App. 6a-8a). Respondent's failure to object at trial consequently did not bar consideration of his claims on collateral attack. The instructions were clearly wrong in light of *Belton*, *Howard*, *Green* and *Wharton* (Pet. App. 5a), and, in the court's view, "the evidence of malice was equivocal" (*id.* at 11a). Since the erroneous instructions "may well have precluded the reasonable juror from considering manslaughter as a possible verdict" (*ibid.*), the court found that the plain error standard had been satisfied.

The court also held that if the "cause" and "actual prejudice" standard of *Davis* were applicable, it too was satisfied (Pet. App. 14a-15a n.17). Since the erroneous instructions "were standard" (*ibid.*) at the time of respondent's trial, his "counsel had every right to assume that any objection to the instructions would have been futile" (*id.* at 13a). According to the court of appeals, the assumed futility of objection was sufficient "cause" under *Davis* to excuse the failure to object. The showing of "actual prejudice" required by *Davis* was established, according to the court of appeals, because the evidence of malice was "equivocal" and the instructions may have precluded the jury from returning a manslaughter verdict.[9]

[9] The court of appeals did not comment on the district court's conclusion (Pet. App. 29a) that respondent was not entitled to relief because he could have raised his present contentions in his prior motions for relief under 28 U.S.C. 2255. See *Sanders* v. *United States*, 373 U.S. 1, 17-18 (1963).

The court of appeals denied the government's petition for rehearing en banc, four judges dissenting (Pet. App. 21a-28a). In the dissenters' view, the panel (*id.* at 28a),

> [u]sing the standard of direct appeal instead of collateral review; ignoring the *en banc* decision * * * on direct appeal; mischaracterizing evidence this court had found to be clear, convincing and sufficient; * * * misinterpreting and misapplying recent Supreme Court cases * * * [had] managed to free at last a brutal contract killer originally thought worthy of the death penalty.

SUMMARY OF ARGUMENT

I.

Society's interest in generally enforcing contemporaneous objection rules is substantial and is not subject to serious dispute. On direct appeal, the plain error doctrine codified in Fed. R. Crim. P. 52(b) permits a court to recognize and correct obvious and prejudicial errors notwithstanding counsel's failure to make timely objection or to raise the claim on appeal. See, *e.g.*, *Wiborg* v. *United States*, 163 U.S. 632, 659 (1896). The court may correct error essentially without regard to the reason for the failure to raise the claim. Even on direct appeal, however, society's substantial interests in generally enforcing contemporaneous objection rules should not be lightly disregarded. See, *e.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). However the balance is struck on direct review between (1) the individual's interest in obtaining an error free trial (notwithstanding his procedural default) and (2) society's interest in enforcing legitimate procedural rules, the latter is substantially more weighty in collateral proceedings, and therefore contemporaneous objection rules should ordinarily be strictly enforced in that context. See *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154 n.13. This Court has repeatedly emphasized society's strong interest in preserv-

ing the finality of criminal judgments (see, *e.g.*, *Sumner* v. *Mata*, No. 79-1601 (Jan. 21, 1981), slip op. 11 n.3) and the fundamental differences between direct review and collateral proceedings (see, *e.g.*, *United States* v. *Addonizio*, 442 U.S. 178, 184-185 & nn.10-11 (1979)).

Giving due effect both to the substantial interests served by enforcing contemporaneous objection rules and to the differences between direct review and collateral proceedings, this Court adopted the "cause and prejudice" standard for determining when a procedural default can be excused on collateral attack. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Davis* v. *United States*, 411 U.S. 233 (1973). The cause and prejudice standard has its origins in Fed. R. Crim. P. 12; it has been "incorporated directly into the body of law governing the availability of federal habeas corpus review." *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 85; see *Francis* v. *Henderson*, *supra*, 425 U.S. at 542. The interests in finality and orderly procedure are the same in the federal and state criminal justice systems. See *Francis* v. *Henderson*, *supra*, 425 U.S. at 542. Accordingly, the cause and prejudice standard is equally applicable to collateral attacks by federal prisoners as to those by state prisoners.

The court of appeals' holding in this case that the "plain error" principle of Rule 52(b) is applicable in collateral proceedings effectively nullifies the "cause" element of the cause and prejudice standard, obliterates the distinction between direct appeal and collateral attack, and promises federal prisoners endless "appeals" pursuant to 28 U.S.C. 2255. Society's interest in the finality of criminal judgments and orderly trial procedure "deserves greater respect" (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 88).

II.

Respondent has failed to demonstrate "cause" sufficient to justify relief on collateral attack in the face of his failure to make timely objection in accordance with Fed. R. Crim. P. 30.

1. In both *Wainwright* and *Davis*, no explanation was offered for the failure to make timely objection, and in both cases this Court concluded that the substantive claims were barred without speculating as to the possible reasons for the procedural defaults. See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 91; *Davis* v. *United States*, *supra*, 411 U.S. at 243-245. In this case, there is no evidence that the actual reason defense counsel failed to object to the erroneous jury instructions was a belief that objection would have been futile. Nevertheless, because the erroneous instructions were "standard" at the time of trial, the court of appeals concluded that respondent's "counsel had every right to assume that any objection to the instructions would have been futile" (Pet. App. 13a) and on that basis found sufficient "cause" to excuse the procedural default (Pet. App. 14a-15a n.17). If, however, respondent's attorney failed to object to the jury instructions for some reason other than the belief that objection would have been futile, the possibility that some other attorney might have failed to raise timely objection because he believed it futile provides no basis for excusing the procedural default in this case.

2. As we demonstrate elsewhere, it is doubtful that timely objection to the erroneous instructions in this case would in fact have been futile. If respondent's attorney failed to object to the jury instructions on malice because he *erroneously* believed that objection was futile, the court of appeals' holding in this case amounts to a conclusion that inadvertence or negligence is sufficient cause to excuse a procedural default. Absent a finding of constitutionally ineffective assistance of counsel, however, neither inadvertence nor negligence is enough. The possibility that an attorney may make an error of judgment or overlook a potentially meritorious claim is inherent in an adversary system, and even the "erroneous" decisions of counsel must ordinarily be deemed binding. See *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3, 512 (1976); *id.* at 514-515 & nn.3-4 (Powell, J., concurring).

3. Even assuming that respondent's attorney considered objecting to the malice instructions and that he *correctly* concluded that objection in the trial court and on direct appeal would have been futile, we submit that no "cause" sufficient to excuse the procedural default has been shown. See, *e.g.*, *Cole* v. *Stevenson*, 620 F.2d 1055, 1062-1063 (4th Cir.) (en banc), cert. denied, No. 80-5172 (Nov. 17, 1980). An attorney's judgment that a particular claim is not worth making because it would be futile is not different from any of the other strategic or tactical considerations that an attorney must weigh in determining how best to represent his client. The only significance of a "change" in the law of the sort we assume was effected by the subsequent decisions of the court of appeals is that (1) defense counsel might have come to a different conclusion as to whether objection should be made, and (2) the objection, if made, would have been sustained at trial or the conviction would have been reversed on appeal.

Neither the "cause and prejudice" standard nor contemporaneous objection rules like Fed. R. Crim. P. 30 turn on the extent of the litigant's knowledge or the clarity of the law. The major premise of the decision in *Wainwright* v. *Sykes* is the familiar principle "that a constitutional right may be forfeited * * * by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). Thus, the inquiry mandated by the *Wainwright* "cause" requirement is not whether the litigant's failure to raise the claim is blameworthy or whether he knowingly and intentionally waived his claim (compare *Fay* v. *Noia*, 372 U.S. 391, 438-439 (1963)), but whether the reason asserted for the failure to make timely objection is sufficiently compelling to justify subordinating the interests of the state in orderly trial procedure and the finality of criminal judgments. The speculation, however substantial, that an objection would be rejected is not a suffi-

cient justification for excusing noncompliance with a contemporaneous objection rule.

III.

Even assuming the court of appeals correctly concluded that cause had been shown for excusing respondent's procedural default or that his claims were properly reviewable under a plain error standard, the record falls far short of demonstrating the kind of actual prejudice that would justify setting aside his conviction on collateral attack. When the brief erroneous statements in the charge to the jury are considered in context and in light of the evidence at trial, it is manifest that respondent suffered no prejudice.[10]

First, whatever slight adverse impact the erroneous statements might otherwise have had was substantially mitigated, if not eliminated, by the rest of the court's instructions to the jury. Viewing the instructions as a whole, it is highly unlikely that any of the jurors understood them to direct a finding of malice solely on the basis of a finding that a weapon had been used or that the killing had been intentional.

Second, even if the trial court had not made the erroneous statements concerning malice, the record compels the conclusion that the jury would have found malice in any event. The nature of the crime itself—a killing by means of an extended beating—virtually forecloses any conclusion that malice was absent. Moreover, the jury in fact found that the murder was premeditated and deliberate, having been properly instructed as to those elements; it is inconceivable that the jury that found the killing to have been premeditated and deliberate would nevertheless have concluded that it was not done with malice.

Finally, the court's instructions on malice were irrelevant to the defense asserted at trial, which did not call into question the degree of culpability, but instead in-

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[10] Even under Fed. R. Crim. P. 52(b) a criminal defendant must show that the claimed errors "affect[ed] substantial rights."

volved a total denial of participation in the crime, and an argument that the real murderer had escaped while the police were chasing respondent (J.A. 54-55).

* * * * *

This case involves only jury instructions concerning malice in a murder prosecution.[11] Nevertheless, the reasoning of the court of appeals is applicable in any case involving an arguably significant error in jury instructions or in evidentiary rulings. If, as the court of appeals held, the plain error standard of Fed. R. Crim. P. 52(b) is applicable on collateral attack, or the failure to object to erroneous jury instructions or to raise the point on appeal may be excused on collateral attack on the ground that objection might have been "assumed" to be futile, every change or clarification in the law concerning such matters will prompt a new round of collateral attacks. And if criminal convictions may be set aside on showings of prejudice as ephemeral as that made here, no criminal conviction will ever be final. "Appeals" under 28 U.S.C. 2255 will be "interminable" (*Sunal* v. *Large*, 332 U.S. 174, 182 (1947)).

ARGUMENT

I. THE "PLAIN ERROR" DOCTRINE HAS NO PLACE IN COLLATERAL PROCEEDINGS

A. Contemporaneous Objection Rules Should Ordinarily be Strictly Enforced in Collateral Proceedings

1. This Court has repeatedly recognized society's fundamental interest in the finality of judgments in criminal cases. "[B]oth society and the individual criminal de-

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[11] The defective instructions on malice given at respondent's trial were apparently quite commonly used (see note 25, *infra*). The decision in the instant case is therefore likely to render a large proportion of the murder convictions obtained in the District of Columbia prior to the decision in *Belton* v. *United States*, 382 F.2d 150 (1967), in cases involving the use of a weapon, subject to successful collateral attack.

fendant have [an interest] 'in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.'" *Sumner* v. *Mata*, No. 79-1601 (Jan. 21, 1981), slip op. 11 n.3, quoting *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).[12] See *Blackledge* v. *Allison*, 431 U.S. 63, 83-84 (1977) (Powell, J., concurring); *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 259-266 (1973) (Powell, J., concurring). In *United States* v. *Addonizio*, 442 U.S. 178, 184-185 n.11 (1979), the Court elaborated on this theme:

> Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. * * * Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful.

The resources committed to the administration of criminal justice are finite and, like other scarce resources, must be rationally utilized. Time spent processing collateral attacks is time that cannot be devoted to disposing of current cases. See also *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979), quoting from *United States* v. *Smith*, 440 F.2d 521, 528 (7th Cir. 1971) (Stevens, J., dissenting). Too ready availability of col-

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[12] A lack of respect for the finality of judgments undermines the goals of deterrence and rehabilitation, which are integral to our system of criminal law. See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452-453 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-150 (1970).

lateral relief undermines the notion of finality, encouraging the view among criminal defendants and society at large that the administration of criminal justice in this country is little more than a relentless "quest for error" (*Bihn* v. *United States*, 328 U.S. 633, 638 (1946)).

2. Review on direct appeal provides a remedy for most significant errors; collateral relief is appropriately reserved for the extraordinary case:

> When Congress enacted § 2255 in 1948, it simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and collateral review. It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.

United States v. *Addonizio*, *supra*, 442 U.S. at 184. In enacting Section 2255, Congress provided "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *Stone* v. *Powell*, *supra*, 428 U.S. at 491-492 n.31. Nevertheless, "[s]o far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal* v. *Large*, 332 U.S. 174, 178 (1947); see *United States* v. *Addonizio*, *supra*, 442 U.S. at 184 n.10; *United States* v. *Timmreck*, *supra*, 441 U.S. at 784; accord, *Stone* v. *Powell*, *supra*, 428 U.S. at 477 n.10. By its uncritical application of "plain error" principles to the present case, the court of appeals obliterated any meaningful distinction between direct appeal and collateral attack, nowhere acknowledging the repeated admonitions of this Court that there are fundamental differences between these two remedies.

3. As this Court recognized in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), enforcement of contemporaneous objection rules contributes significantly to the finality of

criminal judgments. Orderly trial procedure requires that objections to evidentiary rulings or to jury instructions be presented to the trial court in the first instance. The failure to make timely objection to potential errors occurring during the course of a trial is particularly egregious, since a timely objection might prevent any error. *Id.* at 88-89. See also *Henderson* v. *Kibbe*, 431 U.S. 145, 157-158 (1977) (Burger, C.J., concurring); *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring). For these reasons, Fed. R. Crim. P. 30 provides that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." It is true that several courts of appeals have held that "plain error" (Fed. R. Crim. P. 52(b)) in jury instructions affecting substantial rights may be noticed on direct appeal notwithstanding the command of Rule 30.[13] But, as this Court has noted, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154.

This case, however, is not a direct appeal, but a collateral attack on a final judgment. In this context, "[t]he strong interest in preserving the finality of judgments, * * * as well as the interest in orderly trial procedure, must be overcome before * * * relief can be justified." *Id.* at 154 n.13 (citations omitted).[14] Accord-

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[13] See, *e.g.*, *United States* v. *Spiegel*, 604 F.2d 961 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980); *Government of the Virgin Islands* v. *Navarro*, 513 F.2d 11 (3d Cir.), cert. denied, 422 U.S. 1045 (1975); see also *Namet* v. *United States*, 373 U.S. 179, 190-191 (1963).

[14] Rule 9(a) of the Rules Governing Proceedings in the United States District Courts under Section 2255 authorizes the denial of relief if the Government has been prejudiced by the delay in seeking relief. The Advisory Committee Note explains: "Subdivision

ingly, whatever may be the appropriate rule on direct appeal before the judgment becomes final, the importance of preserving the finality of criminal judgments requires strict enforcement of contemporaneous objection rules like Rule 30 on collateral attack.

B. Procedural Defaults May be Excused on Collateral Attack Only If Both Cause and Prejudice are Established

1. The court of appeals concluded that the appropriate "standard for review" in this case was found in Fed. R. Crim. P. 52(b), which gives courts discretion to notice and correct "[p]lain errors or defects affecting substantial rights * * *" (Pet. App. 8a). This holding is inconsistent with the "cause and prejudice" standard established by this Court for determining when a procedural default will be excused on collateral attack. See *Wainwright* v. *Sykes, supra; Francis* v. *Henderson*, 425 U.S. 536 (1976); *Davis* v. *United States*, 411 U.S. 233 (1973). Under the "cause and prejudice" standard, no relief can be granted in a collateral proceeding unless the movant demonstrates both that there was some compelling reason for his failure to raise the particular claim in a timely fashion and that he suffered "actual prejudice" from the error. The inquiry initially focuses upon the "cause" asserted to excuse the failure to comply with the procedural rule and its sufficiency in light of the purposes the procedural rule was designed to serve. By requiring the movant to demonstrate a sufficient reason for failing to comply with the contemporaneous objection rule, the "cause and prejudice" standard

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(a) provides a flexible, equitable time limitation based on laches to prevent movants from withholding their claims *so as to prejudice the government* both in meeting the allegations of the motion and *in any possible retrial*" (emphasis added). See generally *Henson* v. *Estelle*, 641 F.2d 250, 252-253 (5th Cir. 1981). The court of appeals dismissed this consideration, observing that the government had not been "prejudiced in *responding to the motion*" (Pet. App. 8a; emphasis in original).

serves the salutary purpose of encouraging litigants to comply with such rules and recognizes the fundamental differences between direct appeal and collateral attack.

The "plain error" standard of Rule 52(b), on the other hand, is inconsistent with the limited scope of collateral proceedings and, we submit, is inappropriate in that context. In the context of trial and direct appeal, the rule permits courts to recognize and correct obvious and prejudicial errors notwithstanding counsel's failure to make appropriate objection or to raise the claim on appeal. See, *e.g.*, *Wood* v. *Georgia*, No. 79-6027 (Mar. 4, 1981), slip op. 3 n.5; *Wiborg* v. *United States*, 163 U.S. 632, 659 (1896). It confers relatively broad discretion to correct errors overlooked by counsel essentially without regard to the existence of any excuse or justification for counsel's dereliction.[15] The inquiry on direct appeal focuses not upon the reasons for the failure to object, but upon the impact of the error. It is clear, therefore, that the court of appeals' adoption of "plain error" as the appropriate standard of review on collateral attack effectively nullifies the "cause" portion of the "cause and prejudice" standard.

2. In *Davis* v. *United States*, *supra*, the Court held that failure to challenge the composition of the grand jury before trial in accordance with Fed. R. Crim. P. 12, barred the claim on collateral attack absent a showing of "cause," as required by Rule 12, and a showing of prejudice. As to "cause," the Court explained (411 U.S. at 242):

> We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of "cause" for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely

[15] While the rule is applicable without regard to the reason for counsel's omission, it is appropriately applied only if the perceived error or defect affects substantial rights. See note 34, *infra*.

> different but much more liberal requirement of waiver [*i.e.*, deliberate bypass] in federal habeas proceedings.

Thus, the cause and prejudice standard has its origins in Fed. R. Crim. P. 12.[16] Because of the substantial policies furthered by generally enforcing contemporaneous objection rules, however, the cause and prejudice standard has been "incorporated directly into the body of law governing the availability of federal habeas corpus review." *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 85; see *Francis* v. *Henderson*, *supra*, 425 U.S. at 542.

Both *Wainwright* and *Francis* involved collateral attacks on state court convictions pursuant to 28 U.S.C. 2254, rather than attacks on federal convictions under 28 U.S.C. 2255. Nevertheless, as the Court explained in *Francis* (425 U.S. at 542, quoting *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969)):

> "[P]lainly the interest in finality is the same with regard to both federal and state prisoners . . . . There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants."

Nor is there any reason to give *less* preclusive effect to procedural defaults by federal defendants than to similar defaults by their state counterparts. See generally *United States* v. *Hearst*, 638 F.2d 1190, 1196 (9th Cir.

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[16] In *Davis* this Court also said that "no more lenient standard of waiver" should apply on collateral attack than in the criminal proceeding itself (411 U.S. at 240-241). Here, the court of appeals inverted the reasoning of *Davis*, citing it for the proposition that the *same* standard of review should govern on collateral attack and direct appeal (Pet. App. 8a & n.9). Although this is a conceivable interpretation of the *language* of *Davis* (see Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050, 1060 (1978)), the Court's subsequent decisions have made it clear that the trial of a case "shall be the 'main event,' and that any subsequent collateral proceeding, at least where there have been procedural defaults at the trial, shall have the limited function of preventing 'a miscarriage of justice.'" *Id.* at 1062, quoting *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 90-91.

1980), cert. denied, No. 80-1445 (Apr. 27, 1981); *United States* v. *Williams*, 615 F.2d 585, 590-591 (3d Cir. 1980); *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); *Buckelew* v. *United States*, 575 F.2d 515, 519-520 (5th Cir. 1978); *Sincox* v. *United States*, 571 F.2d 876, 879-880 (5th Cir. 1978). Indeed, the reasons for applying the cause and prejudice standard are even more compelling in the context of a collateral attack on a federal conviction, since the prisoner will, as in this case, already have had an opportunity to present his federal constitutional claims to a federal district court as well as to a federal appellate court. Compare *Fay* v. *Noia*, 372 U.S. 391, 415-418, 421-422, 424 (1963); see also *Stone* v. *Powell*, *supra*, 428 U.S. at 493-494 n.35.

In *Wainwright* v. *Sykes* this Court recognized the substantial policy considerations that underlie contemporaneous objection rules, and therefore rejected "deliberate bypass" (see *Fay* v. *Noia*, *supra*, 372 U.S. at 438-439) as the standard for determining whether a claim can be raised in federal collateral proceedings notwithstanding a procedural default. First, and foremost, timely objection may avert error, "thereby making a major contribution to finality in criminal litigation" (433 U.S. at 88); even if the objection comes too late to avoid an initial error, corrective measures may be taken or, at the very least, the likelihood that there will be further instances of similar errors is reduced. See *Estelle* v. *Williams*, *supra*, 425 U.S. at 508 n.3, 512.[17] Second, when

[17] Also, as the *Wainwright* Court noted with respect to constitutional claims concerning the admissibility of evidence (433 U.S. at 89), "[a]n objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the * * * trial judge will admit the evidence he must contemplate the possibility of reversal by the * * * appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the * * * rejection of the federal constitutional claim." The same is true with respect to arguably erroneous jury instructions. See note 24, *infra*.

an individual is brought to court to stand trial, "[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens" (433 U.S. at 90). "Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification" (*ibid.*). Third, "the rule of *Fay* v. *Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty * * * with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off" (433 U.S. at 89) and at a time when retrial is unlikely.[18] Fourth, if factual findings are necessary, "[a] contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding" (*id.* at 88). The trial judge will be able to assess the demeanor and credibility of witnesses and to make appropriate factual determinations, and a court that reviews the issue later will have the benefit of the trial court's judgment and insight.

The requirement of a contemporaneous objection also provides some assurance that the alleged error was actually considered damaging to the party who later complains. There are many tactical reasons why counsel will refrain from objecting even if an immediate objection might be sustained. The failure to raise an objection is often strong indication that an error that may appear significant on the cold record presented to a reviewing court was in fact not particularly important or damag-

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[18] Even if the lawyer does not consciously engage in such "sandbagging," a relaxed attitude toward contemporaneous objection rules discourages the kind of vigilance that will keep the trial as free from error as possible and preserve it as the "main event" rather than a "tryout on the road" for a later appeal (*i.e.*, collateral attack). *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 90.

ing to the non-objecting party. If timely objection is made, the trial judge is uniquely qualified to weigh the impact of the error in the context of the entire proceedings, thereby guarding "against the magnification on appeal of [errors] which were of little importance in their setting." *Glasser* v. *United States*, 315 U.S. 60, 83 (1942).[19]

Thus, unlike the plain error doctrine codified in Fed. R. Crim. P. 52(b), the cause and prejudice standard does not ignore the reason for the procedural omission or focus on possible prejudice alone. *Wainwright* rests on the principle "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944).[20] The inquiry man-

[19] Much the same considerations suggest that the failure to raise claims of error on direct appeal should independently bar their assertion on collateral attack absent a separate showing of cause for their omission from the appeal. Usually the decision on direct review will be made soon enough after trial that a retrial is possible if the conviction is reversed. On the other hand, if the issue is not raised until years later on collateral attack, vacating the conviction often provides not merely a "remedy," but the "windfall" of what is in effect a dismissal of the charges. Likewise, if a remand for evidentiary hearings is required, the recollections of the witnesses generally will be fresher after direct appeal than after collateral attack. Furthermore, the failure to raise the issue on direct appeal often indicates that the alleged error was not in fact of substantial significance. Requiring a defendant to raise issues on appeal will appropriately serve society's interest in the finality of criminal convictions. We therefore submit that the failure to raise an issue on direct appeal should bar a claim on collateral attack absent a showing of cause and prejudice. See *Sunal* v. *Large*, *supra*; *Forman* v. *Smith*, 633 F.2d 634, 638-640 (2d Cir. 1980).

[20] See also *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring); *Davis* v. *United States*, 411 U.S. 233 (1973); *Tollett* v. *Henderson*, 411 U.S. 258, 267-268 (1973); *Michel* v. *Louisiana*, 350 U.S. 91, 99 (1955). See generally Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. Pa. L. Rev. 473 (1978).

dated by the *Wainwright* "cause" requirement is whether the reason for the failure to make timely objection is sufficient to outweigh the substantial interests furthered by generally enforcing contemporaneous objection rules.[21] Because a collateral attack can be made at any time, even, as in this case, nearly two decades after trial, both the difficulty of adjudicating the legal claim and the consequences of a grant of relief on collateral attack may be substantially greater than on direct appeal. Accordingly, the cause and prejudice standard established by this Court for determining when a procedural default can be excused on collateral attack is appropriately much more stringent than the standards that govern on direct review.

Ignoring these basic considerations, the court of appeals applied the "plain error" principle in this case, thereby totally excusing respondent's failure to comply with the contemporaneous objection requirement of Rule 30 or to raise his claim on appeal. Because it requires no justification for the party's failure to object at trial, the "plain error" rule does nothing to encourage compliance with contemporaneous objection rules and may indeed have the opposite effect. Moreover, the application of this doctrine on collateral attack blurs the distinction between direct appeal and collateral attack and promises a prisoner innumerable "appeals" under a standard of review no more exacting than that appropriate for direct review. Society's strong and legitimate interest in the finality of judgments in criminal cases "deserves greater respect" (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 88). The "cause" and "actual prejudice" standard is responsive to

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[21] It should be emphasized that the inquiry is not whether the defendant's interest in having his claim reviewed on the merits outweighs the state's interest in enforcing its procedural rule in his particular case. Rather, the question is whether the reason offered by the defendant is sufficiently compelling to justify disregarding the state's substantial interests in generally enforcing its procedural rules.

the concerns underlying this fundamental interest; the plain error doctrine of Fed. R. Crim. P. 52(b) is not. See generally *Tyler* v. *Phelps*, 643 F.2d 1095, 1101 n.9 (5th Cir. 1981).

II. NO CAUSE SUFFICIENT TO EXCUSE THE FAILURE TO MAKE TIMELY OBJECTION TO THE ERRONEOUS JURY INSTRUCTIONS HAS BEEN SHOWN

Attempting to bolster the untenable conclusion that respondent's failure to object to the instructions at trial could be totally excused through application of the "plain error" rule, the court of appeals found "parenthetically" that the "cause and prejudice" standard was satisfied here (Pet. App. 14a-15a n.17). According to the court, the two erroneous instructions were "standard" at the time of respondent's trial, and, therefore, respondent's "counsel had every right to assume that any objection to the instructions would have been futile" (Pet. App. 13a).[22]

A. No Cause of Any Kind Has Been Established In This Case

As noted above, the major premise of this Court's decision in *Wainwright* is the "familiar" principle (*Yakus* v. *United States*, *supra*, 321 U.S. at 444) that rights may be lost, even in criminal cases, by failure to assert them in a timely fashion. The decision in *Wainwright* "leave[s] open for resolution in future decisions

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[22] Although the instructions may have been "standard" in 1963, our research has revealed no case in which they were approved prior to that time, and the court of appeals cited none. Furthermore, in both *Belton* and *Green I* (the two cases in which the instructions were first expressly disapproved), the courts seemed to regard the instructions as contrary to existing law and attributed the erroneous instructions to inadvertence on the part of the trial court. See 382 at 154; 405 F.2d at 1370. See also pages 32-33, *infra*.

the precise definition of the 'cause'-and-'prejudice' standard" (433 U.S. at 87); it is, however, quite plain that the cause and prejudice standard was intended to be substantially more stringent than the "deliberate bypass" standard of *Fay* v. *Noia* that it replaced. Under the deliberate bypass standard, if a criminal defendant could not be said to have waived his claim knowingly and intentionally, federal habeas corpus relief was generally available without regard to whether the claim would have been barred on direct appeal. See, *e.g.*, *Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972); *Fay* v. *Noia*, *supra*, 372 U.S. at 438-439; *Kaufman* v. *United States*, 394 U.S. 217, 227-228 & n.8 (1969).

In contrast with the deliberate bypass standard, procedural rules requiring that particular types of claims be raised at or before trial or forfeited do not depend on whether the defendant or his counsel actually considered the claim and then decided against raising it. See, *e.g.*, Fed. R. Crim. P. 12, 30. Rather, the claims must be raised at the specified time or forgone, whether the failure to comply with the rule was knowing and intentional or not. Superimposing the *Fay* v. *Noia* deliberate bypass standard on state and federal procedural rules, therefore, had the undesirable effect of nullifying contemporaneous objection rules. While the contemporaneous objection rule might be enforced on direct appeal, federal habeas remained available. The ready availability of relief on collateral attack, however, discouraged enforcement of contemporaneous objection rules even on direct appeal. See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 89-90. Thus, to the extent that enforcement of contemporaneous objection rules encouraged timely objection, the deliberate bypass standard substantially diluted that incentive.

Unlike the deliberate bypass standard of *Fay* v. *Noia*, the cause and prejudice standard does not require " 'an intentional relinquishment or abandonment of a known right or privilege' " (*Fay* v. *Noia*, *supra*, 372 U.S. at 439, quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Rather, the failure to make timely objection

results in forfeiture of the right unless "cause" and "actual prejudice" are demonstrated. The inquiry mandated by the *Wainwright* "cause" requirement is not merely whether there is some hypothetical reason that might explain the failure to make timely objection, or even whether the attorney had a good reason for failing to do so, but whether the reason is sufficient to outweigh the substantial interests furthered by generally enforcing contemporaneous objection rules. The conclusion of the court of appeals in this case that the apparent or assumed futility of objection constitutes "cause" virtually denies the concept any content. In light of the forfeiture principle upon which the decision in *Wainwright* rests, and the compelling reasons stated for adopting the "cause and prejudice" standard, the assumed futility of objection cannot constitute sufficient "cause" to excuse a procedural default.

2. The court of appeals concluded that respondent's counsel "had every right to assume" (Pet. App. 13a) that objection to the instructions would have been futile. There is, however, no indication that counsel in fact decided not to object for this reason. The prospect that his requests might be denied did not deter respondent's counsel from requesting other jury instructions (R. 22) or from protesting the denial of those requests in a motion for new trial (R. 27) and on direct appeal. See *Frady I*, *supra*, 348 F.2d at 105-106. If the failure to object was not in fact the product of any assumption by counsel, reasonable or otherwise, about the futility of objection, the possibility that some other attorney might have elected to ignore the contemporaneous objection requirement because he believed objection futile is no reason for excusing the default in this case.

Moreover, this Court's decisions in *Wainwright* and *Davis* make it plain that the burden of showing "cause" for the failure to make timely objection rests on the movant. See, *e.g.*, Goodman & Sallett, *Wainwright* v. *Sykes: The Lower Federal Courts Respond*, 30 Hast. L.J. 1683,

1707 (1979). The speculation of the court of appeals in this case is no substitute for the requisite showing of "cause." "[I]t is not for this court to speculate as to possible reasons for the failure to object when [the movant] has advanced no explanation." *Tyler* v. *Phelps*, 643 F.2d 1095, 1100, 1101 n.9 (5th Cir. 1981). Accord: *Washington* v. *Estelle*, No. 80-1023 (5th Cir. June 16, 1981), slip op. 8086; see also *Conquest* v. *Mitchell*, 618 F.2d 1053 (4th Cir. 1980). In both *Wainwright* and *Davis*, no explanation for the failure to make timely objection was offered, and in both cases this Court concluded that the substantive claims were barred, without speculating as to the possible reasons for the procedural defaults. See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 91; *Davis* v. *United States*, *supra*, 411 U.S. at 243-245.

B. Assumed Futility Of Objection Is Not Sufficient To Excuse A Procedural Default

As noted in the preceding discussion, the record affords no basis for the court of appeals' apparent assumption that respondent's failure to object to the erroneous instructions in this case was in fact based on any judgment by his counsel regarding the likely futility of a properly made objection. But even assuming *arguendo* either that this was in fact the reason for counsel's omission, or that the showing of "cause" may properly be predicated upon the reasons a hypothetical lawyer might have had for the procedural default rather than the actual reasons that existed in the particular case, we now show that futility of objection is not a proper basis for excusing a procedural default—either, as we discuss first, if the lawyer's assumption of futility is erroneous, or, as we subsequently argue, even if the judgment regarding futility is in fact accurate.

1.*a*. If counsel considered the possibility of objecting to the instruction but rejected (deliberately bypassed?) that option because he erroneously believed that objec-

tion would have been futile, that should not excuse the default.[23] Even accepting the court of appeals' implicit conclusion that an attorney's judgment that a particular claim is insubstantial or unlikely to be accepted constitutes a reasonable ground for not raising the claim, the erroneous belief that objection is futile is not sufficient "cause". The court offered no basis, and we perceive none, for distinguishing the assumed futility of objection from all the other strategic or tactical considerations that must be taken into account in deciding which claims should be pursued and which forgone. Not every conceivable argument can be effectively presented in any litigation. Of necessity, an attorney must focus his attention and efforts on those claims that he believes are most likely to prove helpful. Existing case law tending to support or undercut a particular claim is only one of the many factors that must be considered. The court of appeals effectively adopts the untenable position that because the assumed futility of objection *explains* the failure to make timely objection, it also excuses it.

We submit that the concept of "cause" cannot mean simply that defense counsel might have had some reasonable explanation for failing to make timely objection. See *Satterfield* v. *Zahradnick*, 572 F.2d 443, 446 (4th Cir.), cert. denied, 436 U.S. 920 (1978). With respect to those claims that the attorney considered and nevertheless failed to raise, there will always be some reason,

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[23] See *Estelle* v. *Williams*, *supra*, 425 U.S. at 514-515 (Powell, J., concurring); *United States* v. *Brown*, Nos. 77-2106 & 78-1646 (D.C. Cir. Aug. 10, 1981) (en banc), slip op. 5-6; *Breest* v. *Perrin*, No. 80-1635 (1st Cir. July 1, 1981), slip op. 7-8; *Washington* v. *Estelle*, No. 80-1023 (5th Cir. June 16, 1981), slip op. 8085-8086; *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); *Polizzi* v. *United States*, 550 F.2d 1133, 1138-1139 (9th Cir. 1976); see also *Gates* v. *Henderson*, 568 F.2d 830, 843 n.6 (2d Cir. 1977) (en banc) (Oakes, J., concurring), cert. denied, 434 U.S. 1038 (1978). But see *Rachel* v. *Bordenkircher*, 590 F.2d 200 (6th Cir. 1978); *Collins* v. *Auger*, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), cert. denied, 439 U.S. 1133 (1979).

and in most cases a good reason, for his decision. He may conclude that a claim is insubstantial in light of current law and that the likelihood of prompting a change in the law is small. Or, given his theory of the case or the strength of the prosecution's evidence, a lawyer might conclude that a particular claim is unlikely to affect the outcome of the trial even if successfully urged. See, *e.g.*, *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 93 n.2 (Burger, C.J., concurring). If a lawyer has several points to make at trial (or on appeal), any one of which might be dispositive, he may reasonably conclude that others are not worth pursuing or, indeed, harmful, on the theory that raising an unpromising argument might divert attention from or dilute the force of other arguments that are judged more likely to succeed. See *Cole* v. *Stevenson*, 620 F.2d 1055, 1071 n.25 (4th Cir.) (*en banc*) (Murnaghan, J., dissenting), cert. denied, No. 80-5172 (Nov. 17, 1980). If, as in the present case, the "error" is simply irrelevant to the chosen defense (see pages 47-48, *infra*), the attorney will have little if any reason to object.

An advocate's goal is to win the war or, failing that, to minimize the consequences of the loss, not simply to win as many little skirmishes as he can. Cf. *Tollett* v. *Henderson*, 411 U.S. 258, 267-268 (1973); *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 768-771 (1970). The possible reasons for failing to raise a potentially meritorious claim are limitless. A decision to refrain from objection for reasons such as are suggested in the preceding paragraph would be an intentional and knowing one and arguably would even constitute a "deliberate bypass" of orderly trial procedures for raising the claim. See, *e.g.*, *Murch* v. *Mottram*, 409 U.S. 41 (1972); *Coco* v. *United States*, 569 F.2d 367 (5th Cir. 1978); *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972); cf. *Lefkowitz* v. *Newsome*, 420 U.S. 283, 291 (1975). See also *Wainwright* v. *Sykes*,

supra, 433 U.S. at 98-99 (White, J., concurring). Ironically, however, if the "cause" requirement of *Wainwright* is satisfied by the existence of a reasonable explanation for failure to raise a claim in timely fashion, the "cause and prejudice" standard would be more lenient than the "deliberate bypass" standard that it replaced.

b. In this case, of course, it is quite doubtful that objection would have been futile. In both *Belton* and *Green I* (the two cases in which the instructions were first expressly disapproved), the court of appeals seemed to regard the law on the point as clear. In both cases, the court attributed the erroneous instructions to inadvertence on the part of the trial court. See 382 F.2d at 154; 405 F.2d at 1370. There is little reason to assume that a timely objection would have gone unheeded in respondent's case.[24]

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[24] Timely objection to the instructions on malice would have forced the prosecutor to consider the possibility that the court of appeals would accept the common sense proposition that the "law" does not "infer[] or presume[]" the existence of malice, an element of the offense, but merely allows the jury to infer the existence of malice from the nature of the weapon used and the manner in which it was used. Or, since the definition of malice was clear at the time, the prosecutor would have been forced to consider the very substantial possibility that the court of appeals would accept the proposition that an intentional act is not "therefore" done with malice. Given the strength of the evidence of malice in this case, the prosecutor might well have agreed to an instruction that the jury "may infer" malice from the nature of the weapon and the way in which it was used. As to the second erroneous statement, it seems almost certain that the prosecutor would not have opposed eliminating the "therefore" language, since the court intended to (and did) explain (J.A. 27; emphasis added) that "malice" is the "condition of mind which prompts a man to do a wrongful act *wilfuly* [*sic*], that is on purpose, to injury of another or to do *intentionally* a *wrongful* act toward another *without justification or excuse*," thus directing the jury to find malice only if they found an act that was not only *intentional* but also *wrongful, wilful, and without justification or excuse*. Even if the prosecutor refused to accede to such requests, these same reasons might have led the trial judge to modify the instructions even though the modifications were not unambiguously required by any decision squarely on point.

Since 1966, pattern jury instructions for the District of Columbia have been published by the Young Lawyers Section [formerly the Junior Bar Section] of the Bar Association of the District of Columbia in a volume commonly referred to as the "Red Book." Although the first edition of these instructions was published in 1966, prior to the decisions of the court of appeals in *Belton* and *Green I*, the pattern instruction on first-degree murder does not contain the instructional errors complained of here. See D.C. Bar Ass'n, *Criminal Jury Instructions for the District of Columbia*, No. 83 (1st ed. 1966). Because of the number of appellate decisions in which one or both of these errors were noted, it cannot be doubted that these instructions were commonly used.[25] That these errors were not contained in the 1966 edition of the "Red Book," however, strongly supports the conclusion that a timely and properly explicated objection would not have been futile even before the decisions in *Belton* and *Green*. In any event, granting arguendo that it could reasonably have been deemed likely, or even certain, that the trial court would overrule an objection, a defendant's trial counsel is obviously aware, at the time he is deciding whether to raise a claim, that any conviction is subject to appellate review. It is difficult to believe that it would have been futile in 1965 for respondent to present his current objections to the jury instructions to the court of appeals that decided *Belton* in 1967 and *Green I* in 1968.

Thus, even accepting the court of appeals' speculation that respondent's counsel failed to make timely objec-

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[25] In addition to *Belton*, *Howard*, *Green I* and *Wharton*, see, *e.g.*, *United States* v. *Evans*, No. 81-1281 (D.C. Cir. Apr. 20, 1981); *United States* v. *Perkins*, 498 F.2d 1054 (D.C. Cir. 1974); *Mitchell* v. *United States*, 434 F.2d 483 (D.C. Cir.), cert. denied, 400 U.S. 867 (1970); *United States* v. *Green*, 424 F.2d 912 (D.C. Cir. 1970) (*Green II*), cert. denied, 400 U.S. 997 (1971); *Logan* v. *United States*, 411 F.2d 679 (D.C. Cir. 1968); *Sims* v. *United States*, 405 F.2d 1381 (D.C. Cir. 1968).

tion because it appeared futile, in this case that is no more than an assertion that the attorney erroneously or negligently failed to raise a potentially meritorious objection.[26] At least in the absence of a finding of constitutionally ineffective assistance of counsel, negligence or inadvertence is not cause sufficient to excuse a procedural default.[27] The possibility that an attorney may make an error of judgment or overlook a potentially meritorious claim is inherent in an adversary system, and ordinarily even the "erroneous" decisions of the attorney must be deemed binding. See *Estelle* v. *Williams*, *supra*, 425 U.S. at 508 n.3, 512; *id.* at 514-515 & nn.3-4 (Powell, J., concurring).

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[26] Although the assumption of "futility" would have been erroneous, it is far from clear, as demonstrated below (see Part III, *infra*) that the ultimate decision not to raise the claim was unreasonable.

[27] Compare *Breest* v. *Perrin*, *supra*, slip op. 7-8; *Washington* v. *Estelle*, No. 80-1023 (5th Cir. June 16, 1981), slip op. 8083, 8085-8086; *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); and *Polizzi* v. *United States*, 550 F.2d 1133, 1138-1139 (9th Cir. 1976), with *United States* v. *Williams*, 615 F.2d 585, 591 (3d Cir. 1980); *Boyer* v. *Patton*, 579 F.2d 284 (3d Cir. 1978); and *Sincox* v. *United States*, 571 F.2d 876 (5th Cir. 1978). See generally *Graham* v. *Mabry*, 645 F.2d 603, 607-608 (8th Cir. 1981); *United States* v. *Hearst*, 638 F.2d 1190 (9th Cir. 1980), cert. denied, No. 80-1445 (Apr. 27, 1981); *Jiminez* v. *Estelle*, 557 F.2d 506 (5th Cir. 1977). See also *Gates* v. *Henderson*, 568 F.2d 830, 843 n.6 (2d Cir. 1977) (en banc) (Oakes, J., concurring), cert. denied, 434 U.S. 1038 (1978).

Some courts have suggested, however, that mere inadvertence or ignorance is sufficient cause. See *Rachel* v. *Bordenkircher*, 590 F.2d 200 (6th Cir. 1978) (inexperience, inattention, or lack of knowledge of the law sufficient cause); *Collins* v. *Auger*, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), cert. denied, 439 U.S. 1133 (1979) (lack of knowledge of law or facts sufficient cause); see also *Jurek* v. *Estelle*, 593 F.2d 672, 683-684 n.25 (5th Cir.) (in capital case, serious misfeasance is sufficient cause), vacated, 597 F.2d 590 (1979) (see 5th Cir. R. 17), decision on rehearing en banc, 623 F.2d 929 (5th Cir. 1980), cert. denied, No. 80-763 (Mar. 23, 1981).

2. The court of appeals' conclusion that sufficient cause to excuse the procedural default had been shown in this case thus rests on the assumptions that respondent's counsel thought about objecting to the malice instructions, that he correctly concluded that objection would have been futile in the trial court, and that the claim would also have been rejected on direct appeal. Accepting these assumptions for present purposes, we submit that neither the futility of objection in 1963 nor the subsequent "change" in the law provides sufficient basis for disregarding the unequivocal command of Fed. R. Crim. P. 30. See *Cole* v. *Stevenson, supra*, 620 F.2d at 1062-1063; *Indiviglio* v. *United States, supra*, 612 F.2d at 631; *Dumont* v. *Estelle*, 513 F.2d 793, 798-799 (5th Cir. 1975); see also *Ratcliff* v. *Estelle*, 597 F.2d 474, 476-477 (5th Cir. 1979); *United States ex rel. Maxey* v. *Morris*, 591 F.2d 386, 391 (7th Cir. 1979).[28] Having failed to pursue the avenues for relief provided, respondent should not be permitted on collateral attack to justify his failure by saying he "deemed any [objection] futile." *Sunal* v. *Large, supra*, 332 U.S. at 181.

The significance of a change in the law of the sort we are assuming occurred here is essentially that (1) respondent's counsel *might have* come to a different conclusion as to whether objection should be made, and (2) the objection, if made, would have been sustained at trial or the conviction would have been reversed on appeal.[29] Thus, the court

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[28] But see *Isaac* v. *Engle*, 646 F.2d 1129, 1133-1134, 1138 (6th Cir. 1980) (Jones, J., concurring), cert. granted, No. 80-1430 (Apr. 20, 1981); *Myers* v. *State of Washington*, 646 F.2d 355, 359-361 (9th Cir. 1981); compare *Rummel* v. *Estelle*, 587 F.2d 651, 653 & n.2 (5th Cir. 1978) (en banc), aff'd on other grounds, 445 U.S. 263, 268 n.7 (1980).

[29] As we have shown above, the instant case does not appear to present a true change in the law, but rather presents at most a situation like that in *Sunal* v. *Large, supra*, 332 U.S. at 181, "where at the time of the conviction[] the definitive ruling on the question of law had not crystallized." Even where there has been a change in the law, however, we submit that the failure to raise the issue

of appeals' holding that the futility of objection at the time of trial is sufficient "cause" to excuse a procedural default may rest on the notion that a criminal defendant has some right to have the "important" legal issues in his case determined in light of the most recent decisions on the point or that a defendant should not be penalized for his attorney's failure to "anticipate" a subsequent decision. It would be said that because the defendant could not have known of the subsequent decision at the time of trial, he cannot be held responsible for the failure to raise the claim. Therefore, it is somehow unfair to "punish" him for failure to raise the claim by enforcing a contemporaneous objection rule. This approach is faulty for two reasons. First, a criminal defendant generally has no right to have the legal issues in his case determined in light of subsequent decisions.[30] Second, it misconceives the nature of contemporaneous objection rules and the cause and prej-

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at trial or on direct appeal constitutes a procedural default that precludes collateral relief unless the "cause and prejudice" test is satisfied. The change in the law is not alone sufficient to constitute "cause."

[30] As Judge Friendly pointed out in a similar context:

> There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause "litigation in these criminal cases [to] be interminable" [*Sunal* v. *Large*,] 332 U.S. at 182 * * *, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. * * * When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws.

United States v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir. 1963).

udice standard, which, as noted above, do not turn on the extent of the litigant's knowledge or blame-worthiness.

a. This Court has frequently refused to give retroactive application to decisions announcing new legal rules in criminal cases. See, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531 (1975); *Daniel* v. *Louisiana*, 420 U.S. 31 (1975); *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Linkletter* v. *Walker*, 381 U.S. 618 (1965). A criminal defendant therefore plainly has no general right to have legal issues involved in his case determined or redetermined in light of the most recent decisions of this Court or other governing authority. Nor does a criminal defendant have any substantial basis for complaint if his attorney, though competent, fails to anticipate a particular holding on a point that could have been, but was not, raised at his trial. "'[A] defendant is entitled to a fair trial but not a perfect one,' for there are no perfect trials." *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973) (citations omitted).

b. It is of course true that in cases considering the retroactivity of new decisions this Court has treated the fact that the new rule relates to the reliability of the guilt-determining process as a consideration weighing strongly in favor of retroactivity. See *Hankerson* v. *North Carolina*, 432 U.S. 233, 241 (1977). The court of appeals employed such reasoning in holding that the decisions in *Wharton* and *Green I* should be applied retroactively to respondent's case (Pet. App. 15a-17a). But even assuming that those decisions are properly given retroactive effect, that does not resolve the question whether the failure to comply with legitimate procedural rules should bar the claim on collateral attack. This Court has recognized that procedural rules may bar relief on a claim even though subsequent decisions indicating that the claim has merit have been held retroactive. Indeed, this Court has expressed the view that a criminal defendant can be required to object to jury instructions even though they reflect standard, well-settled practice. In considering the possible impact of retroactive applica-

tion of *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), the Court observed (*Hankerson* v. *North Carolina*, *supra*, 432 U.S. at 244 n.8 (emphasis added)):

> If the validity of such burden-shifting presumption were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. * * * *The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.* See, *e.g.*, Fed. Rule Crim. Proc. 30.

Similarly, in *Lee* v. *Missouri*, 439 U.S. 461 (1979), this Court held *Duren* v. *Missouri*, 439 U.S. 357 (1979), retroactive, but specifically noted that

> in any case in which a jury was sworn subsequent to *Taylor* v. *Louisiana* and the fair-cross-section claim based on exclusion of women was rejected on direct review or in state collateral proceedings because of the defendant's failure to assert the claim in timely fashion, relief is unavailable under 28 U.S.C. § 2254 unless the petitioner can show cause for having failed to raise his claim properly in the state courts. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

Lee v. *Missouri*, *supra*, 439 U.S. at 462.[31] The subsequent decision in *Duren*, though retroactive, was not thought to constitute sufficient "cause" to excuse the failure to make timely objection.

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[31] In *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), the Court held that the Sixth and Fourteenth Amendments require that petit juries be selected from a pool fairly representative of the community and that women could not be systematically excluded from jury service. *Taylor* is inapplicable to cases in which the jury was sworn prior to the date of that decision. *Daniel* v. *Louisiana*, 420 U.S. 31 (1975). In *Duren* v. *Missouri* the Court invalidated a state system which exempted women from jury service upon request.

3. Substantial policy considerations counsel against accepting the notion that apparent futility, or futility in fact, is sufficient "cause" to excuse a procedural default. First, and perhaps most important, a refusal to enforce procedural defaults for this reason could have extraordinarily sweeping consequences when a new rule is announced relating to a frequently used instruction or a recurring evidentiary point. Large numbers of prior cases, tried without objection under the prior practice, would become subject to invalidation in collateral attack proceedings.[32]

Accepting the assumed futility of objection as sufficient "cause" permits the attorney to deny the trial court the opportunity to consider the matter and to avoid error. Failure to raise the claim in the trial court also makes it less likely that a court reviewing the conviction on direct appeal will notice the error and correct it at a time when it is possible to retry the case. In addition, and perhaps of greater importance, the error is perpetuated and the number of criminal convictions that will be subject to collateral attack when it is finally corrected is increased.

Furthermore, indulging the assumption, as the court of appeals did in this case, that defense counsel failed to raise a claim because it would have been futile, too readily absolves defense counsel of the obligation to establish a record. Like the deliberate bypass rule, acceptance of the futility of objection as sufficient excuse for a procedural default removes incentives to raise claims that may prompt improvements in the law. Com-

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[32] The holding of the court of appeals in this case thus attaches a severe price to any decision to alter or abandon a frequently used instruction or commonly invoked evidentiary ruling. The impact of a change in the law could be limited by giving the new rule only prospective application, but, as noted above, this Court's decisions suggest that new rules affecting the reliability of the fact-finding process should be applied retroactively at least in those cases pending on direct review. *E.g.*, *Hankerson* v. *North Carolina*, *supra*, 432 U.S. at 241.

pare *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967).[33] There is little reason to spend time and effort pursuing a claim that is, by definition, unlikely to be successful, if nothing is lost by failing to do so.

Moreover, unless a retrospective judicial conclusion of futility is to be deemed sufficient without regard to the actual reasons for the default in the particular case, the federal courts will inevitably be drawn into the "complex task of disentangling excusable lack of clairvoyance from quiet strategic waiver. The answer in each case, turning on subtle degrees, would necessarily be haphazard, and its basis * * * inherently unsatisfactory" (*Dumont* v. *Esteile*, *supra*, 513 F.2d at 798). Except in a few clear cases involving the overruling of settled precedent, the judgment that objection could reasonably have been deemed futile will involve a substantial element of speculation and second-guessing that would be wholly unnecessary if the procedural rule had been obeyed.

Finally, accepting "futility" as sufficient "cause" would encourage the sort of "sandbagging" criticized in *Wainwright*. An objection or argument that, if made at trial, provides only marginal prospects of affecting the result even if successful, can increase in value after conviction. If it is entertained and accepted on direct appeal, the defendant will probably get a "second bite at the apple." See, *e.g.*, *United States* v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir. 1963). A second chance for acquittal relatively soon after the first trial is valuable, but later events may make retrial substantially more difficult, if

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[33] As Judge Poole stated in dissent in *Myers* v. *State of Washington*, 646 F.2d 355, 364 (9th Cir. 1981):

> [I]t should be remembered that the boundaries of constitutional rights have historically been redefined, patient mete and meter, largely by the efforts of diligent and thoughtful attorneys who search for and raise "new" but logical and reasonable extensions of previously established, or at least suggested, doctrines.

not impossible. Thus, after all other claims have been rejected, a claim that might have been relatively insignificant at trial may as a practical matter become dispositive if accepted on collateral attack. The present case is a classic illustration of that proposition.

III. NO PREJUDICE HAS BEEN SHOWN TO HAVE RESULTED FROM THE ERRONEOUS JURY INSTRUCTIONS

The "cause and prejudice" standard requires not only a showing of "cause" to excuse a procedural default, but also a showing of "actual prejudice." *Davis* v. *United States*, *supra*, 411 U.S. at 245; *Francis* v. *Henderson*, *supra*, 425 U.S. at 542. When the record of his trial is appraised realistically, it seems plain beyond all serious dispute that respondent suffered no substantial prejudice because of the erroneous jury instructions given during his trial.[34]

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[34] Even under the plain error doctrine, the alleged error must be more than "plain" or "clear." The plain error test focuses primarily upon the prejudice suffered by the defendant. See *Tyler* v. *Phelps*, *supra*, 643 F.2d at 1101 n.9. In *United States* v. *McCord*, 509 F.2d 334, 341 n.10 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975), the court of appeals recognized that "the doctrine of plain error encompasses those errors which are obvious, affect the substantial rights of the accused and if uncorrected would be an affront to the integrity and reputation of judicial proceedings." Numerous decisions make it clear that the plain error doctrine is to be invoked only in exceptional circumstances, when necessary to avoid a miscarriage of justice. See, *e.g.*, *Silber* v. *United States*, 370 U.S. 717, 718 (1962); *Johnson* v. *United States*, 318 U.S. 189, 199-201 (1943); *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); *United States* v. *Cormier*, 639 F.2d 1177, 1183 (5th Cir. 1981); *United States* v. *Brewer*, 630 F.2d 795, 801 (10th Cir. 1980); *United States* v. *Berry*, 627 F.2d 193, 199 (9th Cir. 1980), cert. denied, No. 80-5659 (Jan. 19, 1981); *United States* v. *Krasn*, 614 F.2d 1229, 1235-1236 (9th Cir. 1980); *United States* v. *Kopel*, 552 F.2d 1265, 1274 (7th Cir.), cert. denied, 434 U.S. 970 (1977); *United States* v. *Van Horn*, 553 F.2d 1092, 1094 (8th Cir. 1977); *United States* v. *Rudinsky*, 439 F.2d 1074,

1. It is well established that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); accord, *Boyd* v. *United States*, 271 U.S. 104, 107 (1926). Moreover, "the process of instruction itself is but one of several components of the trial which may result in [a] judgment of conviction." *Cupp* v. *Naughten*, *supra*, 414 U.S. at 147. Thus, even on direct appeal, an appellate court must "view the [jury] charge itself as part of the whole trial." *United States* v. *Park*, 421 U.S. 658, 674 (1975). The question in a collateral proceeding "is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, [or the instruction otherwise resulted in an unconstitutional conviction, and] not merely whether the instruction is undesirable, erroneous, or even universally condemned." *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154 (citations and internal quotation marks omitted).[35]

In the instant case, it is highly unlikely that the erroneous instructions had any impact at all upon the jurors, who heard them as brief portions of a lengthy

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1076 (6th Cir. 1971). Even if this Court accepts the proposition that the plain error doctrine rather than the cause and prejudice test applies in Section 2255 proceedings, it is clear that respondent has not demonstrated the substantial prejudice required to justify reversal under the plain error standard.

[35] As noted above, none of the decisions of the D.C. Circuit in which the instructions involved in this case were disapproved purported to rest on constitutional grounds, although the court of appeals seems to have assumed that they did. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), is, of course, inapplicable since there was no affirmative shift of the burden of proof. Furthermore, while *Mullaney* has been held retroactively applicable to cases pending on direct appeals when it was decided (see *Hankerson* v. *North Carolina*, *supra*), the court of appeals did not hold *Mullaney* applicable in this collateral attack and expressly declined to decide whether *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), was applicable to this case.

charge. "To a lawyer, there is an undeniable gulf between 'the law infers' and 'the law permits you to infer'" (*Belton* v. *United States*, *supra*, 382 F.2d at 154). To the ordinary juror, however, the "gulf" is likely to be perceived as a very thin line, particularly when, as in this case, the court also explained that malice was an element of the offense and that the jury had to find that the government had proved every element of the offense beyond a reasonable doubt. See *id.* at 154-155. As to the second erroneous statement, even if it is assumed that the jurors appreciated the significance of the phrase "and is therefore done with malice," it seems unlikely that they would have understood the judge to be directing them to find malice if they found intent. The court had just indicated that malice was to be inferred from all the circumstances and that to find malice the jury had to find that the act was not only intentional but also "wilful[ ]," "wrongful" and "without justification or excuse" (J.A. 27).

In any event, the remaining portions of the charge cured or mitigated whatever impact the brief, erroneous passages might otherwise have had. The trial court instructed the jury on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt (J.A. 19-20), reminding the jurors that, in determining whether the government had met this burden, they were to consider "the testimony of all the witnesses * * * and all the circumstances concerning which testimony ha[d] been introduced" (J.A. 20). In defining the elements of first-degree murder, the court instructed that "[i]f a man uses upon another an instrument of such a nature and in such a way and under such circumstances that such use would naturally and probably result in death, then you are not compelled to presume that he intended to kill from such acts but have the right to consider them in reaching a determination of his intent" (J.A. 27). After instructing on premeditation and deliberation (J.A. 28), the court concluded its instruc-

tion on first-degree murder, reminding the jury that the government must prove each of the elements beyond a reasonable doubt (*ibid.*).

2. When this case is compared to others in which the impact of the same instructions was considered, it is even more apparent that no "actual prejudice" resulted. In its opinion the court of appeals properly took into account its decisions in *Belton*, *Howard*, *Green I*, and *Wharton*. It totally ignored the fact that those were all decisions on direct appeal. In *Belton*, the decision that first disapproved the statement that "the law infers * * * malice" from the use of a deadly weapon, the court nevertheless *affirmed* a first-degree murder conviction, observing that "[a] jury inferring premeditation and deliberation could hardly have failed to infer malice." 382 F.2d at 155. A second-degree murder conviction was affirmed in *Howard*, although the same instruction had been given. In neither case did the court of appeals find plain error requiring reversal. It is strange that the defendants who blazed this trail *on direct appeal* did not benefit from the rulings that have been employed to free respondent on collateral attack.[36]

Although relying heavily upon *Green I* and *Wharton*, decisions in which murder convictions were reversed, the court of appeals overlooked crucial factual differences between those cases and this one. In *Green I*, the defendant, who was convicted of first-degree murder, had admitted firing the fatal shots and presented a claim of self-defense. He thus had squarely raised the questions of malice and intent, and the court emphasized that "on the facts there was an issue of manslaughter for the jury." 405 F.2d

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[36] There is something especially incongruous about finding plain error in a collateral attack by a federal prisoner such as respondent, who has already had his conviction painstakingly reviewed by an en banc court of appeals, to which the error in question either was not "plain" or was not deemed sufficiently substantial to warrant discussion in its thorough opinions, let alone reversal of the conviction.

at 1370. At the retrial the defendant was again convicted of first-degree murder. The court of appeals affirmed the conviction, although the trial court, without objection, had repeated one of the instructional errors that had led to the earlier reversal. The court emphasized that "it is inconceivable that the jury that found the appellant guilty of deliberate and premeditated murder would have failed to find malice * * *." *Green II*, *supra*, 424 F.2d at 913.[37]

In *United States* v. *Wharton*, *supra*, the defendant had been convicted of second-degree murder. As in *Green*, the defendant admitted shooting the decedent but claimed self-defense. The court emphasized that, unlike the situation in *Belton*, there had been no finding of premeditation and deliberation. 433 F.2d at 457-458. Because the conviction was for second-degree murder, and because malice was the only distinguishing element between second-degree murder and manslaughter, the court reversed the conviction.

In this case the court of appeals found no error in the instructions on premeditation and deliberation. Because of the manner in which the crime was carried out and the evidence that respondent had been hired to commit it, it is "inconceivable that the jury that found [respondent] guilty of deliberate and premeditated murder would have failed to find malice * * *." *Green II*, *supra*, 424 F.2d at 913. Neither the court of appeals nor respondent has suggested any plausible basis for concluding that any jury that found the murder to have been premeditated and deliberate could possibly have concluded that it nevertheless was not done with malice.

3. If respondent had objected to the erroneous instructions relied on by the court of appeals, the district court should properly have told the jury (1) that the law

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[37] Compare *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 156: "[T]he jury's determination that the respondent acted recklessly necessarily included a determination that the ultimate harm was foreseeable to him."

permits the jury to consider the fact that the killing had been accomplished with a deadly weapon in determining whether the government had proved "malice" and (2) that in determining whether the government had proved that the killing was done intentionally, wilfully, wrongfully, without justification or excuse and, therefore, with malice aforethought, it should consider all of the surrounding circumstances. Given the evidence at trial, it is virtually certain that the jury that convicted respondent of first-degree murder would still have found malice even if these instructions had been given in lieu of the two erroneous statements.[38]

The evidence of malice was little short of overwhelming. Respondent and his colleague had been hired by the victim's brother and promised a "bonus" if they did a "good job." Respondent and his colleague bludgeoned and stomped their victim for at least 10 minutes, eventually crushing his skull with several blows from a blunt instrument. Compare, *e.g.*, *Howard* v. *United States*, *supra*, 389 F.2d at 290. If there was any justification for this senseless murder other than the "bonus" promised by the man who hired them, it was never revealed.[39]

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[38] Although the sentence of death was set aside on direct appeal, the jury's conclusion that respondent deserved to die for his crime is eloquent testimony that it surely would have found malice even if the court had said you "may infer malice" and had not used the unfortunate phrase which appears to equate intent with malice. As the dissenters noted, the verdict indicated that the jurors found "malice aplenty" (Pet. App. 28a).

[39] According to the court of appeals, the evidence of malice was "equivocal" (Pet. App. 11a, 13a). As the dissenting judges pointed out, however, the "evidence which [the court of appeals] sitting *en banc* found sufficient to support a verdict of first-degree murder simply cannot fairly be described as 'equivocal' " (Pet. App. 27a). Furthermore, the two factors cited by the court in support of its characterization of the evidence (Pet. App. 11a-12a & n.13) are wholly inadequate. That the jury acquitted respondent and his colleague of felony-murder is of no possible significance in light of the trial judge's instructions (J.A. 26, 37-38; see Pet. App. 28a)

4. Finally, the court's instructions on malice were simply irrelevant to respondent's chosen defense. There was no claim of self-defense, passion, accident or anything else suggesting the absence of "malice" or otherwise relevant to respondent's degree of culpability. Instead he disclaimed all responsibility and suggested that the murder had been committed by "a big man" who supposedly was seen leaving the victim's house.[40] It would have been totally inconsistent for respondent then to claim that he was guilty only of manslaughter, an inconsistency that surely would not have been overlooked by the jurors. Yet, in his Section 2255 motion filed some 16 years later,

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that it could not convict for both premeditated murder and felony-murder. And even if the jury overlooked that instruction, the court also instructed that if it did not believe that the defendants intended to rob at the time of or prior to the killing, the jury was to find them not guilty of felony-murder (J.A. 24; see also *id.* at 34). Thus it may be, as the dissenters observed, that "[t]he verdict * * * reflected the jury's belief that Frady entered the house intending not to rob, but to kill * * *" (Pet. App. 28a).

The one conclusion that is wholly untenable is that the acquittal on the felony-murder count reflected any doubt on the part of the jury about the element of malice. The second factor relied on by the court of appeals (*viz.*, that respondent battered the man to death with a "weapon of chance" (Pet. App. 12a)) is strained and unpersuasive, at best. That the killers decided to murder their victim by bludgeoning him with whatever was available in the house, knowing that there would surely be something suitable for the task, provides no basis for doubting that the murder was wilful, wrongful, intentional, and without justification or excuse. Compare *Green I*, *supra*, 405 F.2d at 1370 & n.4.

[40] Clarence Atkins testified that he had been sitting in a parked car on Savannah Street (the street on which Bennett's house was located) at about 9:00 p.m. on the evening of the murder (Tr. 505, 531). He saw respondent and Gordon walking "in an opposite direction" from where he was parked (Tr. 505), saw the police "paddy wagon" go "the same way these two gentlemen went" (Tr. 529), and then saw a big, heavy-set man come out of a house across the street (Tr. 506-507, 529, 531). The man "came across the street, got in his car and pulled away" (Tr. 507).

The closing argument of respondent's counsel (J.A. 41-58) was generally an attack upon the credibility of the government wit-

respondent has done just that: asserting a defense he elected not to present at trial.[41]

By setting aside respondent's murder conviction 17 years after the fact and in the face of such an ephemeral claim of prejudice, the court of appeals has totally ignored the concept of finality in criminal convictions. Respondent did not object to these instructions at trial, no issue respecting them was presented or noticed on direct appeal, and respondent has not demonstrated "cause" for his procedural defaults or material prejudice traceable to the errors.

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nesses and an attempt to persuade the jury that the prosecution's theory of the case was improbable. Counsel also presented a defense theory of the case, however, suggesting that the real murderer had escaped from Bennett's house while the police were pursuing respondent and Gordon. Relying on the testimony regarding the times of various events, counsel argued that "the crux of this case" was that the defendants "couldn't have gotten to [Bennett's house] until the screaming started" (J.A. 54). "[I]f the time element is correct that the Government produced, then the beating started before the boys got there * * *" (J.A. 55).

> Suppose these boys went there and they heard the man screaming. They more than likely could. Would they run away? Would they walk down the street and get out of the way? I think they would. * * * Now, the testimony [by Clarence Atkins] is that immediately after he saw the boys walking down the street, he saw this man come out, come across the street, get in his car and go away after the paddy wagon went around the corner.

J.A. 54-55.

[41] The record suggests that defense counsel decided not to argue to the jury that the evidence was insufficient to show malice at least in part because he recognized that the evidence was more than sufficient to establish that element of the offense. See Tr. 449-450 (agreeing that evidence sufficient on second degree murder), 732 ("[t]here may be implicit in the way this murder was committed on [sic] idea of having malice aforethought"); see also *id.* at 455 (characterizing the murder as "very vicious, brutal"). But cf. J.A. 57 ("I don't believe that it is reasonable to assume that these boys, with no weapons, one of them with a strange girl * * * went to 1109 Savannah St. with premeditation and malice aforethought to kill Thomas Bennett * * *.").

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted.

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SEPTEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 353409 605

Office - Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

No.80-1595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH C. FRADY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. **MUST THE DECISION OF THE COURT OF APPEALS BE AFFIRMED BECAUSE IT RESTS ON AN ADEQUATE, INDEPENDENT FOUNDATION OF LOCAL LAW WHICH THAT COURT HAD JURISDICTION TO APPLY, AND DID APPLY?**

IF NOT,

II. **CONSIDERING FEDERAL PRECEDENTS, DID THE COURT OF APPEALS PROPERLY DETERMINE TO REACH THE MERITS OF RESPONDENT'S JURY INSTRUCTION CLAIMS?**

III. **CONSIDERING FEDERAL PRECEDENTS, DO THE INSTRUCTION ERRORS IN THIS CASE WARRANT RELIEF ON COLLATERAL ATTACK?**

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1595

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH C. FRADY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent is a District of Columbia prisoner convicted solely of local offenses (premeditated and deliberate murder, and robbery, stemming from the same incident).[1] This is not a federal case.

[1]Respondent was released by the U.S. Court of Appeals pending final disposition of this litigation.

Petitioner states accurately the facts, findings, and procedural history, with two exceptions:[2] the unqualified assertions, "respondent and Richard Gordon murdered Thomas Bennett" and "intent was not an issue," are not warranted by the record.[3] The Court of Appeals held the instruction errors in this case created as serious question whether respondent was guilty of murder or manslaughter, and whether a miscarriage of justice occurred. *United States v. Frady*, ___ U.S.App.D.C. ___, 636 F.2d 506, 512 (1980). Furthermore, on direct appeal on judge reviewing all the pertinent facts, held the evidence of premeditation and specific intent to kill insufficient as a matter of law. *Frady v. United States*, 121 U.S.App.D.C. 78, ___, 348 F.2d 84, 97 (1965) (Wright, J., dissenting):

> [A]ppelants arrived at their victim's home unarmed. Compared with their victim, they were men of slight stature. They were admitted after knocking. Subsequently a fight developed in which the victim was killed by being struct on the head with part of a wooden table top, the table presumably having been broken in the fight. Appellants were apparently unaware the victim was dead. [Footnote omitted.] However, they took his wallet and left his apartment.

[2]A third, minor misstatement of the case is found in Petitioner's Brief at 6, n.3: "The court of appeals expressly declined to decide whether this Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979), was applicable in this case." On the contrary, the Court of Appeals held one jury instruction, "every man is presumed to intend the natural and probable consequences of his own act," to be "clearly erroneous" under *Sandstrom*. *United States v. Frady*, ___ U.S.App.D.C. ___, 636 F.2d 506, 509, n.7. The Court of Appeals, however, found no need to determine whether this erroneous instruction prejudiced the jury's consideration of specific intent to kill, since reversal was required due to fundamental errors in the instructions on malice. *Id.*

[3]The government, itself, placed intent in issue by charging felony murder, premised on intent to rob, simultaneously with premeditated murder, which requires intent to kill.

If this were all the evidence, it would not seriously be argued that a sufficient showing of premeditation and deliberation had been made.... Therefore the Government relies on several occurrences taking place some time before the killing. The appellants were seen driving slowly by the victim's house on the afternoon before the killing. About an hour before the killing, they drove by and one of them pointed out the house. One of the appellants picked up a glove before entering the victim's apartment on the night of the killing. Parts of a conversation in a restaurant were overheard shortly before the crime. The appellants were talking with George Bennett, a brother of the victim. One of the appellants was heard to ask Bennett "if he hit a man in the chest, could you break a rib and fracture or puncture a lung, could it kill a person," to which Bennett replied, "You have to hit a man pretty hard." As they were leaving the restaurant, Bennett said to the appellants, "If you do a good job you will get a bonus."

This evidence, while it may suggest a deliberate premeditated intent to enter the victim's home for an illegal purpose [footnote omitted], is too ambiguous to support a finding of an intent to kill. [Footnote omitted.] It is consistent with either an intent to kill or an intent to injure but not kill. Thus, in logic as well as in law, it does not necessarily provide proof of the specific intent to commit premeditated murder.[4]

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[4]The government claims the snatches of restaurant conversation constitute "overwhelming" evidence the killing was a murder for hire. Pet. Br. at 46. If that is so, why was the chief culprit—George Bennett, the man who "hired" respondent—appointed to administer the victim's estate, rather than prosecuted for murder? (Tr. 691). Furthermore, the witness who claimed she heard the restaurant conversation has now recanted her testimony, stating it was coerced. *United States v. Frady*, Cr. No. 402-63 (U.S.D.C., D.C., Statement of Points and Authorities in Support of Release, Exhibit C, filed October 2, 1980). The government acknowledges the recantation but maintains it does not specifically admit the witness perjured herself before. *Id.*, Opposition to Defendant's Motion for Release on Recognizance, filed October 27, 1980, at 5, n.2.

On this evidence the trial judge instructed the jury, first, "a wrongful act . . . intentionally done . . . is therefore done with malice," second, "every man is presumed to intend the natural and probable consequences of his own act," and, third, "the law infers or presumes from the use of . . . [a deadly] weapon in the absence of explanatory or mitigating circumstances the existence of . . . malice."[5] J.A. 27-28.

On collateral attack the government conceded the first and third instructions above were erroneous. *Frady, supra,* ____ U.S.App.D.C. ____, 636 F.2d 508, N. 5. The Court of Appeals held these instructions required the jury to find malice merely upon finding either a wrongful act intentionally done or unexplained use of a deadly instrument. The instructions therefore had the effect of "foreclosing the jury from considering the alternative of manslaughter," which is distinguished from murder by the absence of malice, and was a lesser included offense the trial judge held reasonably raised by the evidence. *Id.*, at 511-512.

The Court of Appeals also held the second instruction above "clearly erroneous" under *Sandstrom v. Montana*, 442 U.S. 510 (1979); but, given the necessity of reversal on the malice issue, the court found no need to determine whether the jury's consideration of specific intent to kill was prejudiced by this error. *Frady, supra,* ____ U.S.App.D.C. ____ 636 F.2d 509, n. 7.

In this Court the government claims respondent waived the instruction errors by failing to object at trial or to raise them on direct appeal. The government argues relief from this alleged waiver required demonstration of "cause" not

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[5]Moments before, the trial judge had instructed that a similar inference or presumption from use of a weapon did not apply to specific intent to kill. J.A. 27.

only for failure to object but also for failure to appeal. The government claims no cause was shown and that, given the "overwhelming" evidence, respondent was not prejudiced by the multiply-erroneous jury instructions.

SUMMARY OF ARGUMENT

I

This is a local, D.C. murder case in federal court due only to the residual effects of statutory provisions now repealed. The Court of Appeals, exercising its Article I jurisdiction, was obligated to apply local law, and did so. Local law imposes no waiver or forfeiture of trial errors for failure to object or to appeal. Local law also warrants relief on the merits in this case, and, therefore, the decision of the Court of Appeals rests on an adequate, independent foundation of local law and must be affirmed.

II

Federal case law also holds that the issues in this case properly may be reached on the merits. No express, federal waiver provision applies to these claims, as the government concedes. This Court's precedents governing collateral attack, moreover, consistently reach the merits of non-federal prisoner claims, where waiver or forfeiture of the claims is not imposed by local law. District of Columbia law imposes no waiver or forfeiture.

In *Henderson v. Kibbe*, 431 U.S. 145 (1977), this Court on collateral attack reached the merits of a jury instruction claim held waived by the highest state court. This precedent

should be followed, as instruction errors, unlike pretrial errors, directly impact the jury's truth-finding function. Ensuring the reliability and integrity of the process which determines guilt or innocence is the central function of the federal Great Writ, and in proper cases the interest in a fair trial must prevail over state or local procedural rules.

III

The government concedes the instructions on malice given respondent's jury were erroneous. Three instructions given at respondent's trial were constitutionally defective under retroactively applied holdings of this Court. These errors call into question the jury verdict on respondent's state of mind. Judges examining the record in this case have noted strong doubts about the evidence of premeditation, deliberation, intent to kill, and malice. The prejudice of the multiple errors therefore warrants relief in this case, since respondent has already served the maximum sentence for manslaughter and his liability for any greater offense is now uncertain.

ARGUMENT

I

THE U.S. COURT OF APPEALS, PURSUANT TO ITS UNIQUE ARTICLE I JURISDICTION TO DECIDE QUESTIONS OF LOCAL LAW IN CERTAIN CASES CONCERNING SOLELY LOCAL CRIMES, PROPERLY REACHED AND DECIDED THE MERITS OF RESPONDENT'S CLAIMS.

Respondent's trial took place prior to the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat 473, at a time when the United States District Court for the District of Columbia had exclusive jurisdiction over local felonies and was, thus, "filling the role of both a local and federal court." *Palmore v. United States*, 411 U.S. 389, 392, n.2 (1973). At that time the U.S. Court of Appeals for the District of Columbia Circuit had appellate jurisdiction to review decisions of not only the District Court, but also the local appellate court; and in exercise of that appellate jurisdiction the U.S. Court of Appeals issued binding decisions on questions of purely local law. *Id.* All such decisions issued prior to February 1, 1971 are still binding on local D.C. courts unless expressly overruled by the District of Columbia Court of Appeals. *Berryman v. United States*, 378 A.2d 1317 (D.C.App. 1977).

The Court Reform Act transferred general jurisdiction over local felonies to a new local court system,[6] but under 28 U.S.C. §2255 the District Court retains jurisdiction to consider postconviction motions from prisoners it has sentenced, even if they were convicted of local crimes and raise only local claims.[7] Thus, when a local prisoner,

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[6]An exception, however, retains District Court jurisdiction to try local crimes when they are joined in an indictment also charging a federal offense. D.C. Code §11-502(3)(1973). *See Palmore*, supra at 392, n.2. Even in the post-Court Reform Act era, this exception has resulted in the federal court both sentencing defendants convicted solely of local offenses and considering subsequent postconviction motions from the. *United States v. Garnett*, ____ U.S.App.D.C. , 653 F.2d 558 (1981).

[7]Section 2255 is available to a prisoner "in custody under sentence of a court established by Act of Congress" and the statute requires the prisoner to seek relief in the sentencing court. Where a D.C. prisoner's motion raises only meritorious claims under D.C. law, the prisoner's conviction fits the category of those "otherwise subject to collateral attack."

convicted in federal court of a local crime, is entitled to release under local law, the District Court must afford this relief. Failure to do so would discriminate against some D.C. prisoners solely on the basis of the court in which they were tried, and pose a serious equal protection question. *United States v. Brown*, 157 U.S.App.D.C. 311, 483 F.2d 1314 (1973); *United States v. Thompson*, 147 U.S.App.D.C. 1, 452 F.2d 1333 (1971).

Under these principles, the relief afforded respondent by the U.S. Court of Appeals is fully warranted. First, under D.C. law failure to object to trial errors is not a waiver or forfeiture precluding either appellate or collateral review. The local courts reach the merits in such cases. *Towles v. United States*, 428 A.2d 836 (D.C.App. 1981) (direct appeal); *Bundy v. United States*, 422 A.2d 165 (D.C.App. 1980) (direct appeal); *Hargett v. United States*, 380 A.2d 1005 (D.C. App. 1977) (collateral attack); *Butler v. United States*, 388 A.2d 883 (D.C. App. 1978) (collateral attack); *Atkinson v. United States*, 366 A.2d 450 (D.C. App. 1976) (collateral attack); *Watts v. United States*, 362 A.2d 706 (D.C. App. 1976) (direct appeal). Furthermore, prior to February, 1971, the U.S. Court of Appeals determined in a case involving a District prisoner that issues not raised on appeal were cognizable on collateral attack. *Tucker v. United States*, 138 U.S.App.D.C. 345, 427 F.2d 615 (1970) (constitutional issues).[8] *Tucker* remains a valid local precedent.

Second, under D.C. law the standards of review on direct appeal and collateral attack for issues not raised at trial are substantively identical. The ultimate inquiry in either case

[8] In *Hargett*, *supra* at 1008, the local appellate court stated collateral attack is not limited to constitutional issues. The issues reached on the merits in *Butler*, *supra*, moreover, were nonconstitutional.

concerns the probability that a miscarriage of justice has occurred. In *Bundy*, *supra* at 767-768, the local appellate court stated on direct appeal:

> [B]ecause appellant did not object . . . at trial, our review is limited to the question whether the error committed rose to the level of plain error. . . . *Watts v. United States*, D.C.App., 362 A.2d 706 (1976) (en banc). Under the plain error standard, the error complained of must be so clearly prejudicial to subtantial rights as to jeopardize the very fairness and integrity of the trial. *Watts v. United States*, *supra*. In this endeavor we look to all the circumstances of the case to determine whether there is a probability that there has been a miscarriage of justice. *Lloyd v. United States*, D.C.App., 333 A.2d 387 (1975).

In *Butler*, *supra* at 886, where the claim had not been raised in the trial proceeding or on direct appeal, the court on collateral attack reached the merits to determine whether "a fundamental error and resultant miscarriage of justice" was present. In *Atkinson*, *supra* at 452, the court noted that under "exceptional circumstances" collateral review extends to "serious defects in the trial" [quoting *United States v. McCord*, 166 U.S.App.D.C. 1, 8, 509 F.2d 334, 341 (1974)]; and in *Hargett*, *supra* at 1008, the court defined "exceptional circumstances" as cases "which involve the denial of a basic right, . . . not . . . limited to constitutional rights." Of significance, *McCord*, *supra*, 166 U.S.App.D.C. ____, 509 F.2d 339-342, nn. 10-13, favorably cited by the local appellate court in *Atkinson*, noted the similarity between plain error review and review on collateral attack.[9].

[9] Local law setting the standards for withdrawal of guilty pleas also supports this point. Under local rules of criminal procedure, a motion to withdraw a guilty plea must be made prior to sentencing. Failure to meet this deadline does not forfeit the right to relief; but, under the rules, a late motion changes the standard of review to "manifest injustice." The same standard is applied by the local D.C. Court of Appeals when a guilty plea is challenged on collateral attack, rather than by delayed motion in the original proceeding. *Lorimer v. United States*, 425 A.2d 1306 (D.C. App. 1981).

Third, under D.C. law two jury instructions on malice identical to those given at respondent's trial have been held erroneous and sufficiently prejudicial to warrant relief despite absence of timely objection. *United States v. Wharton*, 139 U.S.App.D.C. 293, 433 F.2d 451 (1970); *Green v. United States*, 132 U.S.App.D.C. 98, 405 F.2d 1368 (1968). As the government concedes, Pet. Br. at 42, n.35, these holdings have a foundation in local law. Moreover, since *Wharton* and *Green* involved only local, D.C. crimes and were decided prior to February 1, 1971, they are today binding local precedents.

In reviewing respondent's case, the U.S. Court of Appeals was obliged to consider these precedents and determine whether the prejudice of the two erroneous instructions was sufficient to warrant relief on collateral attack. *Brown, supra*; *Thompson, supra*. This judgmental assessment of "the over-all factual situation[]," *Green, supra*, 132 U.S. App.D.C. ____, 405 F.2d 1369, involving locally-developed judicial standards in local criminal case—made by the U.S. Court of Appeals in exercise of unique Article I jurisdiction—is precisely the kind of judgment which this Court has left to the discretion of that lower court:

> Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed.
>
> Where the choice of the [United States] Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere.

Fisher v. United States, 328 U.S. 463, 476 (1946).

Judges examining this case have sharply divided over the evidence of respondent's state of mind and, hence, over the significance of the erroneous malice instructions given at trial. One judge on direct appeal held the evidence of

premeditation and specific intent to kill, viewed in the light most favorable to the government, insufficient as a matter of law. *Frady v. United States*, 121 U.S.App.D.C. 78, ____, 348 F.2d 84, 97 (1965) (Wright, J., dissenting). Other members of the court disagreed.

On collateral attack the Court of Appeals held the erroneous malice instructions required reversal because (1) as the trial judge found,[10] "the evidence in the record warranted a jury instruction on manslaughter," which is distinguished from murder by the element of malice; (2) "the evidence of malice was equivocal" respondent "did not enter the victim's house armed; he killed the victim with a weapon of chance—a piece of furniture"; and (3) the erroneous jury instructions "foreclos[ed] the jury from considering the alternative of manslaughter"; consequently, respondent was "denied a substantial right." *United States v. Frady*, ____ U.S.App.D.C. ____, 636 F.2d 506, 511-512 (1980). The Court of Appeals concluded that a "clear miscarriage of justice has occurred if appellant was guilty of manslaughter but is now serving the penalty for murder." *Id.* at 512.

On motion for rehearing *en banc* a majority of the court chose not to question these judgments, while four judges disagreed, stressing their own assessment of the facts. *Id.* at 514.

Such differences, however, are not for this Court to resolve. *Fisher, supra*. Moreover, the standards applied by the Court of Appeals in this case comport with D.C. law, which the court had jurisdiction, and an obligation, to apply.

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[10]It is the practice of this Court not to disturb a finding of this kind made by both the District Court and the Court of Appeals. *Pick Mfg. Co. v. General Motors Corp.*, 299 U.S. 3 (1936).

The principal authorities invoked by the Court of Appeals to set aside respondent's conviction, *Green* and *Wharton*, *supra*, are valid local precedents. The decision of the Court of Appeals, therefore, rests on an adequate, independent foundation of local law and must be affirmed.

II

UNDER FEDERAL PRECENDENTS, THE COURT OF APPEALS PROPERLY REACHED THE MERITS OF RESPONDENT'S JURY INSTRUCTION CLAIMS

The thrust of the government's argument in this case is that respondent waived or forfeited his right to challenge the erroneous jury instructions because he failed to object at trial and failed to raise the issue on direct appeal; therefore, respondent cannot reach the merits of his claims unless he demonstrates "cause" for both of these procedural failings. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Francis v. Henderson*, 425 U.S. 536 (1976); *Davis v. United States*, 411 U.S. 233 (1973). These authorities, however, do not support the government's position.

Davis involved a federal rule of criminal procedure which expressly applied to the type of claim there raised, expressly deemed the claim waived on direct appeal unless presented pretrial, and afforded relief from the waiver only for "cause." The Court held the "cause" requirement had to be met when the claim was first raised on collateral attack, for to hold otherwise would "perversely negate the Rule's purpose." *Id.* at 242. The Court, at 239, distinguished *Kaufman v. United States*, 394 U.S. 217 (1969), where the Court had reached the merits despite the petitioner's procedural default, on the

ground that "the Court in *Kaufman* was not dealing with the sort of express waiver provision" involved in *Davis*.

Rule 30, Federal Rules of Criminal Procedure, applicable here, is not an "express waiver provision." Failure at trial to object to erroneous instructions does not waive or forfeit the right to relief, it merely changes the standard of review to plain error. Rule 52(b), Fed. R. Crim Pro.; *Namet v. United States*, 373 U.S. 179 (1963).

The government concedes as much, Pet. Br. at 18, but argues that on collateral attack the result should be different. The government suggests two reasons: first, "cause" must be shown for failure to appeal, Pet. Br. at 24, in 19; and second, "the substantial policies furthered by generally enforcing contemporaneous objection rules" have resulted in the "cause" standard being "incorporated directly into the body of law governing the availability of federal habeas corpus review." *Id.* at 21.[11]

The first reason is easily rejected. Accepting it would require this Court to overrule *Kaufman* and *Fay v. Noia*, 373 U.S. 391 (1963). The government urges no such result: furthermore, this Court has reaffirmed the holding of those cases that mere failure to appeal does not waive the right to seek collateral relief. *Humphrey v. Cady*, 405 U.S. 504 (1972). *See Henderson v. Kibbe*, 431 U.S. 145, 157 (1977) (Burger, C.J., concurring).

The second reason is also without merit. The government relies on *Sykes* and *Francis*; but, unlike the Court in those cases, the government overlooks that failure to object at trial does not bar federal habeas relief unless state law deems the claims waived or forfeited. In both these cases the state courts held the claims forfeited, absolutely. In *Francis* the

[11]The last phrase quoted is from *Sykes*, *supra* at 85.

Court, at 542, n.5, recognized that a different result would have been reached had the state courts decided the merits. in *Hankerson v. North Carolina*, 432 U.S. 233, 244, n.8 (1977), this Court again stated that forfeiture of jury instruction errors on collateral attack was a question for states to resolve: "The States, if they wish, may . . . insulate past convictions by enforcing the . . . rule that failure to object to a jury instruction is a waiver of any claim of error."[12]

In the instant case, the Court of Appeals, properly exercising its Article I jurisdiction, determined that the District of Columbia is not a jurisdiction that wishes to so insulate past convictions. Local precedent supports this determination, which this Court should not disturb. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1976); *Fisher, supra*; Argument I, *supra*.

The Balance of policy considerations also supports this determination and commends a similar result even if no deference is given to the District of Columbia's wishes. Since in cases such as respondent's the error is apparent in the original trial record, grant of habeas relief does not depend on factual determinations made long after the

[12]*But see Henderson v. Kibbe, supra*, where seven members of the Court, on collateral attack, reached the merits of a state prisoner's jury instruction claim, though the highest state court had held the claim waived. Respondent respectfully submits that the Court's approach in *Kibbe* was correct, footnote 8 of *Hankerson notwithstanding. Constitutional errors prejudicial to jury deliberations, and calling into question validity of jury verdicts, are the central concern of the federal writ of habeas corpus. Stone v. Powell*, 428 U.S. 465 (1976). Many jury instruction errors fall in that category, and federal enforcement of state rules deeming such errors forfeited would seriously erode the Great Writ. Claims such as those in *Stone v. Powell, Sykes*, and *Francis* are more distant from this central concern. Yet even in *Francis* and *Sykes* the Court was unwilling to hold the claims absolutely waived, despite the state court holdings on the question.

original trial. Moreover, the balance between the sovereign's interest in orderly trial procedure and the criminal defendant's interest in a fair trial is already reflected in Rule 52(b).[13] Where, as here, the petitioner's failure to object or to raise his meritorious claim earlier cannot be attributed to a deliberate attempt to inject error into the proceedings, the interests that remain to be balanced are the sovereign's desire to avoid delayed retrial and the petitioner's interest in fair determination of guilt or innocence.

In the present case, the government has available the original trial transcript and can use it to supply any testimony no longer available. If the evidence against respondent is as "overwhelming" as the government maintains, retrial should cause the prosecutor little concern. Moreover, this is not a case where grant of habeas relief will result in an unwarranted "windfall" to respondent. He has already served the maximum penalty for manslaughter. At stake on retrial is nothing more than that made questionable by the erroneous instructions on malice—is respondent guilty of manslaughter or murder? Those considerations fully warrant affirmance of the Court of Appeals' decision to reach the merits of this case.

III

UNDER FEDERAL PRECEDENTS, THE COURT OF APPEALS PROPERLY GRANTED RELIEF ON THE MERITS.

The Court of Appeals relied on local precedents, the *Green* and *Wharton* decisions, but there can be no serious

[13]To adopt a stricter standard on collateral attack, solely to serve the interest of orderly *trial* procedure, would "preversely negate the rule's purpose." *Davis*, *supra* at 242.

dispute that the instructions challenged in this case are also constitutionally defective under this Court's decisions in *Mullaney*, *Sandstrom*, and *In Re Winship*, 397 U.S. 358 (1970). The instruction presuming malice from unexplained use of a deadly instrument effectively relieved the government of its burden of proving malice beyond a reasonable doubt. The instruction equating malice with an intentional wrongful act had the same effect, particularly when combined with the instruction that the requisite intent "is presumed" if the wrongful act is a "natural and probable" consequence of whatever one does.

Petitioner raises no opposition to these points; the government's position on the merits is that the multiple instruction errors do not warrant relief on collateral attack.

First, the government hypothesizes the "likely" perceptions of "the ordinary juror" regarding the offending instructions and offers its view that "it seems unlikely" that such a juror "would have understood the judge" to mean what he said. Pet. Br. at 43. Respondent respectfully submits this analysis invades the province of the jury and is no basis for reversing the Court of Appeals. The government also claims, however, that the erroneous instructions were cured by the standard instructions on presumption of innocence, the prosecution's general burden of proof, and the jurors' duty to consider the testimony of all the witnesses. This Court rejected an identical contention in *Sandstrom*, *supra* at 518, n.7. The Court of Appeals expressly followed *Sandstrom* on

this point. *Frady, supra,* ___ U.S.App.D.C. ___, 636 F.2d 512, n.15.[14]

Second, the government takes issue with the Court of Appeals' comparison of the facts in this case with those in other local precedents—*Green*; *Wharton*; *Howard v. United States*, 128 U.S.App.D.C. 336, 389 F.2d 287 (1967); *Belton v. United States*, 127 U.S.App.D.C. 201, 382 F.2d 150 (1967). This is not a proper dispute for this Court to address; nonetheless the position of the court of Appeals is entirely correct.

In *Belton* the appellant went unarmed to the home of his former lover, entered the house, exchanged a few words and fired six shots into her as she lay on a bed. The court held the evidence did not reasonably raise the lesser included offense of manslaughter and since the only instruction error concerned malice, the court held the prejudice insufficient to warrant relief under the plain error standard. In the instant case, respondent went to victim's house unarmed, a fight ensued between him, his companion, and the much larger victim, the trial judge held manslaughter reasonably raised by the evidence, and three erroneous instructions eliminating the government's burden to prove malice were given.

In *Howard* the victim was a seven-year-old girl whose throat was slashed by an adult male intruder when she called for help. The court held that the proof of malice was not equivocal and that the lone instructional error on malice did

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[14]Finally in this regard, the government claims, Pet. Br. at 43, that since the trial judge instructed the jurors they were not required to presume *intent to kill* from use of a weapon, this cured the erroneous instruction that the law presumes *malice* from use of a weapon. Respondent respectfully submits that a proper instruction on one element of an offense cannot cure an improper instruction on a different element.

not warrant reversal under the plain error standard. The constrasting facts in *Frady* clearly distinguish *Howard.*

The government argues that in *Green* and *Wharton* self-defense was raised; therefore relief was warranted in those cases but not in *Frady*. But claiming self-defense is merely one way of placing malice in issue. The trial judge and the Court of Appeals in this case both were of the view that manslaughter was fairly raised by the prosecution's evidence. This determination indicates malice was in issue, just as it was in *Green* and *Wharton*, though for different reasons.

Finally, the government disagrees with the Court of Appeals' determination that the malice evidence was "equivocal" and asserts it was "overwhelming." The government adds that the instruction errors were irrelevant to the defense theory of a third man, the real killer. The irrelevance of the errors to the third man defense, however, does not make the errors any less relevant to the government's case, nor does it reduce the government's burden of proof of malice.

Moreover, as noted earlier, the proper characterization of the malice evidence is not the issue in this case. Respondent's conviction must be set aside because the errors were of a kind affecting the jury deliberations on the basic question of guilt or innocence. Judges reviewing the record have expressed grave doubts about the evidence on every aspect of respondent's state of mind. The proof of premeditation, deliberation, intent to kill, and malice has been questioned. Multiple, serious errors occurred in the instructions on malice and respondent is therefore entitled to a new, fair determination of this issue.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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FILED
NOV 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1595

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA

v.

JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1595

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent's principal argument in support of the judgment of the court of appeals in this case is not that it accords with the policies underlying or the precedents interpreting the availability of collateral relief from a criminal conviction pursuant to 28 U.S.C. 2255. Instead, respondent contends (Br. 6-14) that because he was convicted of an offense under the District of Columbia Code, the district court and the court of appeals were in effect acting as local Article I courts; therefore, he argues, the decision to undertake review of his belated challenges to the jury instructions at his trial was nothing more than an application of idiosyncratic local rules, which may not, or at least should not, be reviewed by this Court. He further asserts that the District of Columbia Court of Appeals, now the highest court of the District on questions of local law, would have reached the same result as the court below had it had jurisdiction over his collateral attack proceeding, and that a holding by this

Court foreclosing consideration of his claims would unjustly discriminate against him as compared to persons committing local offenses subsequent to the court reorganization, in violation of equal protection principles. There are numerous, distinct errors in respondent's contention that render it untenable.

(a) Nowhere in the opinion of the court of appeals is there the slightest suggestion that it considered itself to be applying special local rules to a local case. Rather, the opinion clearly purports to be deciding a general issue of federal law in a manner that would equally govern collateral attacks under Section 2255 against convictions for violations of the United States Code. See, *e.g.*, *Oregon* v. *Hass*, 420 U.S. 714, 719-720 (1975). This approach is hardly surprising, since respondent was tried under the Federal Rules of Criminal Procedure and has invoked the general federal collateral attack statute, 28 U.S.C. 2255, as the jurisdictional basis for the challenge to his conviction. Thus, there is no basis for treating the decision in this case as though, contrary to the plain import of the court of appeals' ruling, it only involved a peculiarity of local law.

(b) Decisions of the District of Columbia Court of Appeals do not remotely support respondent's claim (Br. 8-9) that his challenges to the instructions at his trial would have been entertained by the local court system in a collateral attack proceeding. Certainly no case that respondent cites (and none of which we are aware) entails a holding or even an implication that unobjected to instructional errors or similar unpreserved claims of trial error would be entertained by the local courts if first raised on collateral attack. On the contrary, it appears that a defendant would not be permitted to maintain a collateral attack against a judgment of the Superior Court of the District of Columbia on such grounds in the face of procedural defaults such as occurred in the instant case.

Superior Court Criminal Rule 30 is identical to Fed. R. Crim. P. 30. See *Watts* v. *United States*, 362 A.2d 706, 708 n.3 (D.C. 1976) (en banc). Thus, even on direct appeal, the failure to make timely objection to erroneous jury instructions "insulates the disputed * * * [instruction] from appellate interference" (*id.* at 708), unless the District of Columbia Court of Appeals exercises its discretion to consider the instruction as plain error. *Id.* at 708-709 & n.3. Moreover, the District of Columbia Court of Appeals will consider errors not objected to at trial under the plain error doctrine only if the errors are "so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial" (*id.* at 709). See *Towles* v. *United States*, 428 A.2d 836, 842 (D.C. 1981); *Bundy* v. *United States*, 422 A.2d 765, 767-768 (D.C. 1980). In the District of Columbia Court of Appeals "reversals on appeal for errors not raised at trial * * * [are] the exception, and not the rule" (*Towles* v. *United States, supra*, 428 A.2d at 842).

In construing D.C. Code Ann. § 23-110 (1973), the District of Columbia Court of Appeals has made it quite plain that collateral attack is not considered the equivalent of direct appeal. See, *e.g.*, *Butler* v. *United States*, 388 A.2d 883 (D.C. 1978).[1] In *Hargett* v. *United States*, 380 A.2d 1005 (D.C. 1977), and *Atkinson* v. *United States*, 366 A.2d 450 (D.C. 1976), the court considered and rejected ineffective assistance of counsel claims. In both cases, however, the court emphasized the distinction between collateral attack and direct appeal. As explained in *Atkinson* (366 A.2d at 452), on collateral attack pursuant to Section 23-110, a prisoner is entitled to relief on the basis of an error that is

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[1]Indeed, in *Butler* the court followed *Hill* v. *United States*, 368 U.S. 424 (1962), and, contrary to respondent's assertion (Br. 8 n.8), declined to consider asserted violations of procedural rules identical to Fed. R. Crim. P. 32(a) and 43(a) on collateral attack.

neither constitutional nor jurisdictional *only* if it constitutes a serious defect not correctable on appeal or where " 'exceptional circumstances' " justify the failure to make an appropriate claim on direct appeal. Far from supporting respondent's assertion (Br. 8) that "under D.C. law failure to object to trial errors is not a waiver or forfeiture precluding either appellate or collateral review," the decisions of the District of Columbia Court of Appeals cited (see *ibid.*) strongly suggest the opposite conclusion.

(c) Even were there some basis for respondent's assertion that the District of Columbia courts would entertain a collateral attack such as he has brought, the application of general federal law to his case presents no equal protection problem. There is no similarly situated class of persons who would be treated differently from respondent. His access to collateral relief would be precisely the same as that of all persons who committed District of Columbia offenses and were tried in the federal district court under federal rules prior to the court reorganization—*i.e.*, in accordance with the principles governing collateral relief pursuant to 28 U.S.C. 2255. The fact that persons who committed offenses after the court reorganization would have been tried under local rules in the Superior Court and had access to collateral relief under the District of Columbia statute would do no more than create the possibility that differently situated persons might be treated differently. Equal protection principles impose no obligation to equalize the treatment of defendants tried in the federal courts of the District with that of defendants tried in the local courts. *Swain* v. *Pressley*, 430 U.S. 372, 379-380 n.12 (1977).

(d) Further, treating this case as though the trial had been in a state court, respondent invokes (Br. 13-14) the proposition that, in a collateral attack under 28 U.S.C. 2254, the cause and prejudice standard is inapplicable if, notwithstanding a procedural default, the state court considered the merits of the claim on direct appeal. See, *e.g.*,

Francis v. *Henderson*, 425 U.S. 536, 542 n.5 (1976). Respondent contends that the same principle governs in this case. However, the errors relied on in this collateral attack were not considered on the merits on direct appeal. Accordingly, the limitation on the application of the cause and prejudice standard noted in *Francis* v. *Henderson* is plainly inapposite.[2]

2. This Court has established "cause and prejudice" as the standard for determining when a procedural default can be excused on collateral attack in the federal courts. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Davis* v. *United States*, 411 U.S. 233 (1973). Respondent attempts to distinguish *Davis* v. *United States, supra*, on the ground that Fed. R. Crim. P. 30 "is not an 'express waiver provision' " (Br. 13). According to respondent (*ibid.*), Rule 30 "merely changes the standard of review to plain error." The language of the provision speaks for itself: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Inclusion of the word "waiver" or "forfeiture" could not make the provision any clearer. Failure to make timely objection to jury instructions results in forfeiture of the right to obtain review of alleged instructional errors, even though an appellate court may, on direct appeal, exercise its discretion to consider the claim as "plain

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[2]If on direct appeal a court might have, but did not, consider certain errors pursuant to some doctrine akin to plain error, the cause and prejudice standard is nevertheless applicable in federal collateral proceedings. See *Taylor* v. *Harris*, 640 F. 2d 1, 2 n.3 (2d Cir. 1981). A federal habeas court does not sit as a surrogate for the state appellate court, reviewing the record for any error that could have been considered on direct appeal.

error."[3] We thus unavoidably return to the question whether the collateral attack court enjoys the same discretion to grant relief from "plain error" as does the direct review court. We have set forth in some detail (Gov't Br. 15-26) our reasons for contending that the scope of review is not this broad. Respondent has failed to answer those arguments.

3. Respondent concedes (Br. 10, 12) that the D.C. Circuit's decision in this case does not rest on constitutional grounds, but he nevertheless asserts (Br. 15-16), without fleshing out his contention, that the decisions in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); and *In re Winship*, 397 U.S. 359 (1970), support the decision on the merits. Even assuming, however, that a properly preserved objection to the instructions would have justified a reversal on direct appeal on the authority of one or more of those cases,[4] respondent's argument simply misses the point of this case, which focuses on the failure to object to the defective instructions at trial or raise the issue on appeal. Accordingly, identifying a constitutional error in the instructions does not aid respondent, for absent a showing of both cause and prejudice, even constitutional claims may be barred by a procedural

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[3]As we have explained (Gov't Br. 24 n.19), considerations similar to those that support application of the cause and prejudice standard when a defendant has failed to comply with a contemporaneous objection rule suggest that failure to raise an issue on direct appeal should bar a claim on collateral attack absent a showing of cause and prejudice. Nevertheless, neither *Kaufman* v. *United States*, 394 U.S. 217 (1969), nor *Fay* v. *Noia*, 372 U.S. 391 (1963), needs to be further limited in this case since respondent also failed to make a contemporaneous objection to the instructions, as required by Fed. R. Crim. P. 30.

[4]We do not concede that *Mullaney* is applicable in this case (see Gov't Br. 42 n.35). *Winship* is obviously not implicated, since the trial court properly instructed the jury on the government's burden of proof.

default. See, *e.g.*, *Wainwright* v. *Sykes, supra; Francis* v. *Henderson, supra; Davis* v. *United States, supra.*[5]

4. Respondent apparently concedes (Br. 18) "[t]he irrelevance of the errors [in the instructions on malice] to the third man defense," but he contends that there was nevertheless actual prejudice justifying a new trial. According to respondent (Br. 16-18), prejudice is indicated by (1) the trial judge's decision to instruct the jury on the lesser included offense of manslaughter, (2) the fact that malice is an element of first degree murder, and (3) the doubts about the evidence of malice expressed by the court below.[6] This argument might have some force had respondent been convicted of second degree murder, but he was in fact convicted of premeditated and deliberate murder. He does not challenge the instructions concerning premeditation and deliberation. Neither the court of appeals nor respondent has suggested any plausible basis for believing that the jury that found the murder to have been premeditated and deliberate

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[5]We also note that it is far from clear that *Sandstrom* should be given retroactive effect. The courts of appeals are in conflict on this question. Compare *Burton* v. *Bergman*, 649 F. 2d 428, 431 n.3 (6th Cir. 1981), with *United States* v. *Spiegel*, 604 F. 2d 961, 969 n.15 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980). It is debatable whether the constitutional rule announced in *Sandstrom* remedied a defect that "substantially impair[ed]" the "truth-finding function" of the trial or that raised any "serious" questions about the accuracy of guilty verdicts, and retroactive application of the new rule may have a substantial impact on the administration of justice. Thus, it may be inappropriate to give it retroactive application. Compare *Hankerson* v. *North Carolina*, 432 U.S. 233, 243-244 (1977). This case does not in any event present the question.

[6]Respondent also asserts (Br. 18) that his conviction "must be set aside because the errors were of a kind affecting the jury deliberations on the basic question of guilt or innocence." To the extent that this is intended to suggest that on collateral attack an error in a jury instruction concerning an element of the offense is grounds for relief without regard to its likely impact on the jury or its significance at trial, respondent is wrong. *E.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

could nonetheless have concluded that it was not done with malice. Compare *United States* v. *Green*, 424 F. 2d 912, 913 (D.C. Cir. 1970), cert. denied, 400 U.S. 997 (1971); *Belton* v. *United States*, 382 F. 2d 150, 154-155 (D.C. Cir. 1967). Thus, whatever short cuts the defective malice instructions may have allowed the jury to take are immaterial, for the ground it traversed in finding premeditation and deliberation necessarily included the requirements omitted by the inadequate instructions.

CONCLUSION

For the foregoing reasons and the reasons set forth in the government's opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

NOVEMBER 1981

DOJ-1981-11